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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.,
TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE,
VILLAGE PRECINCT OF NEW HAMPTON,
NEW HAMPSHIRE,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE F. BRUDER
ALBERT R. SIMONDS, JR.
BRUDER & GENTILE
1201 Connecticut Avenue, N.W.
Suite 708
Washington, D.C. 20036
(202) 452-1985

Counsel for Petitioner

August 1, 1979

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INDEX

CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Public Service Company of New Hampshire, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 3, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., pp. 1a-45a, *infra*) has not been reported.

The Federal Power Commission issued two Opinions:

(1) Opinion No. 790, *Public Service Co. of New Hampshire,* 19 P.U.R. 4th 210 (FPC, 1977) (App. at 46a-65a, *infra*);

(2) Opinion No. 790-A, *Public Service Co. of New Hampshire,* Docket No. ER76-285 (May 20, 1977) (App. at 66a-71a, *infra*).

Neither of these Opinions has been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 3, 1979 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether, as the Court below held, the Federal Energy Regulatory Commission is powerless, in view of its lack of authority to order reparations, to approve fuel cost surcharge provisions in wholesale electric rate schedules, or whether, as the Court of Appeals for the First Circuit held in *Maine Public Service Co.* v *FPC,* 579 F.2d 659 (1st Cir. 1978), the Commission must address the question of whether those provisions are just and reasonable under the Federal Power Act.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Sections 201(a), 205(a), 205(b), 205(c), 205(d), 205(e) and 313(b) of the Federal

Power Act, 16 U.S.C. §§ 824(a), 824d(a), 824d(b), 824d(c), 824d(d), 824d(e) and 825*l*(b) (1976), and 28 U.S.C. § 1254(1) (1976).

STATEMENT OF THE CASE

This case involves a proceeding before the Federal Power Commission [1] in which the Commission held that it was powerless to allow Public Service Company of New Hampshire ("Public Service") a surcharge to recover from its wholesale customers $1.6 million in fuel expense incurred for wholesale service. The surcharge was included as part of a filing made on November 21, 1975 in which Public Service proposed to revise its wholesale fuel adjustment clause in effect since January 1, 1973 to eliminate a two-month lag in fuel cost recovery (in other words, to provide that fuel costs incurred in, say, January would be recovered in January rather than in March) and to increase the fixed energy rate and the base cost of fuel in the clause to reflect a current level of fuel expense.[2]

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[1] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (August 4, 1977), and Exec. Order No. 12,009, 3 C.F.R. § 142 (Supp. 1978), the Federal Power Commission ceased to exist and its regulatory responsibilities were transferred to the newly created Federal Energy Regulatory Commission. Section 402(a)(1) of the Act transferred all proceedings pending before the FPC to the FERC. These agencies are referred to interchangeably here as the Commission.

[2] As is usual for electric utilities, Public Service's rates include a fixed energy rate and a fuel clause. The fuel clause reflects changes in fuel expense from a base cost of fuel embodied in the fixed energy rate. The fixed energy rate and fuel clause base cost that Public Service proposed to increase were set at the level of fuel expense experienced in 1971. Public Service proposed to increase both the fixed energy rate and fuel clause base cost to the much higher level of fuel expense for the 12 months ended September 30, 1975.

The surcharge provision provided for recovery, over approximately 12 months beginning January 1, 1976, of the expense of fuel burned in November and December 1975 above the base cost of the fuel clause to be superseded. That expense was not recoverable under the new fuel clause and fixed energy rate, which would recover only fuel costs incurred on and after January 1, 1976 on a current month basis. Nor would it be recovered under the old fuel clause, which was superseded by the new clause. The amount that the Company sought to recover through the surcharge represented unbilled fuel clause revenues attributed to resale service carried as an asset on its balance sheet using deferred fuel cost accounting, which the New Hampshire Public Utilities Commission required Public Service to adopt as properly reflecting the economic consequences of its two-month lagging fuel clause.[3]

By order issued December 19, 1975, the Commission permitted the filing to become effective on January 1, 1976 subject to refund, ordered a hearing on the lawfulness of the proposed rates, and granted petitions to intervene.[4] In its subsequent opinions on the merits, Opinion Nos. 790 and 790-A, the Commission did not question the fact that, unless the surcharge were allowed, Public Service would never recover $1.6 million in fuel expense incurred for wholesale service. It concluded instead that the superseded fuel clause used actual fuel costs from the second preceding month as

[3] Under that accounting, at the end of each month Public Service computes the applicable cost of fuel above the base cost in the fuel clause and recognizes this cost above the base cost as revenue although the amount is not actually recovered until later.

[4] *Order Accepting for Filing and Suspending Proposed Fuel Adjustment Clause, Establishing Procedure, and Granting Interventions,* Docket No. ER76-285 (December 19, 1975).

"proxy" estimates which proved to be inadequate measures of actual expense over a period of escalating fuel prices. Based on that interpretation, the Commission found that approval of the surcharge would violate the filed rate doctrine under *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951), and would amount to unlawful reparations under *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944). The Commission never reached the question of whether the surcharge provision was "just and reasonable" under Section 205(a) of the Federal Power Act, 16 U.S.C. 824d(a) (1976), and specifically whether disallowance of the surcharge would be reasonable in view of Commission policy expressed in Order No. 517 that electric utilities should be made "whole" for their fuel costs. 52 F.P.C. 1304, 1305-06 (1974). By later orders the Commission directed Public Service to refund with interest amounts collected under the surcharge and said that Public Service could reinstitute the surcharge with provision for recovering interest should the Commission's decision eventually be overturned.[5]

The Court below affirmed Opinion Nos. 790 and 790-A and Commission orders in two other proceedings consolidated on appeal.[6] The Court adopted the Commission's reasoning in its entirety.

[5] *Order Modifying Opinion No. 790 to Provide for the Payment of Refunds,* Docket No. ER76-285 (August 3, 1977); *Order Denying Rehearing,* Docket No. ER76-285 (September 8, 1977); *Order Clarifying Prior Order,* Docket No. ER76-285 (October 7, 1977).

[6] The Court remanded to the Commission in a third consolidated proceeding, on the ground that the record did not conclusively show that the superseded fuel clause in that proceeding was a "proxy" clause.

REASONS FOR GRANTING THE WRIT

This Court has pending before it in No. 78-1665 a petition for certiorari filed by Jersey Central Power & Light Company to review a decision by the Third Circuit affirming a Commission decision in a case parallel to the one here. *Jersey Central Power & Light Co.* v. *FERC,* No. 78-1185 (3d Cir. December 8, 1978). While Jersey Central's tariff provision is different in form than Public Service's tariff provision, and while Jersey Central's accounting for the lag in fuel clause collections is different than Public Service's accounting, the rate relief that the two utilities seek on similar facts is functionally identical.

As shown by its petition (at 4), Jersey Central's tariff provision proposed to gradually "phase in" an increase in the fuel clause base cost to a current level reflected in the new fixed energy rate. The revenue recovery provided by that device is equivalent to the revenue recovery under the surcharge employed in Public Service's tariff provision. Under Jersey Central's accounting, the booking of the fuel *expense* above the fuel clause base cost is *delayed* until the related fuel clause revenues are collected in later months. Under Public Service's accounting, the booking of the fuel clause *revenues* is *advanced* to the month in which the related fuel costs are incurred. But the "bottom line" effect on the books of deferring fuel costs to the collection of related revenues and of advancing fuel clause revenues to the incurrence of related fuel costs is the same.

Since Jersey Central's and Public Service's tariff provisions and accounting accomplish identical results, the Court should grant both utilities' petitions for certiorari if it grants either utility's petition.

This petition should be granted under two considerations set out in Rule 19 of this Court:

(1) The decision of the Court below directly conflicts with the decision of the First Circuit in *Maine Public Service Co.* v. *FPC,* 579 F.2d 659 (1st Cir. 1978). In that decision the First Circuit held that the Commission incorrectly treated the fuel clause surcharge issue as controlled strictly by legal—as opposed to policy or equitable—considerations.

> [T]he Commission erred insofar as it regarded itself as automatically precluded by prior judicial decisions such as *Montana-Dakota* or *Hope Natural Gas* from approving the surcharge. Those cases involve very different questions and facts. [579 F.2d at 668].

"The Commission," the Court found, "has more latitude in shaping a lawful rate than it has recognized." 579 F.2d at 669.

As to the merits of the surcharge proposal the Court said that

> the mechanism of the earlier fuel cost adjustment clause would eventually have passed on the rising fuel costs temporarily funded by the utility. In this regard MPSC's clause, whatever its practical deficiencies during a period of rising prices, was arguably in keeping with the policy announced by the Commission in Order 517, pertaining to fuel clauses generally, "to make utilities whole," and the surcharge can now be defended as simply implementing the same policy. [Footnote omitted, 579 F.2d at 667-68].

In the light of such considerations, the Court observed that "the matter presents a close issue of rate-making policy . . .". 579 F.2d at 668.

> We miss, however, in the Commission's present decision sufficient focus upon this controlling [just and reasonable] statutory standard. There is not, although one might expect it, any discussion of the effect of the surcharge on the reasonable expectations of wholesale and retail consumers, on the one hand, and the legitimate needs of the utility if it is to continue to serve the community efficiently, on the other. There is little reference to the issue of justness and fairness as between consumer and utility, or to the long-term interests of both. Nor are the retroactive features of the surcharge discussed in terms of the Commission's own regulatory policies or of the public interest. [579 F.2d at 668-69].

The First Circuit held that "[i]n mistakenly treating *Montana-Dakota* and other outside precedent as dispositive, the Commission has failed to perform its proper function—application of the statutory [just and reasonable] standard to the rates and charges in question." 579 F.2d at 669. It remanded the case to the Commission to "take into account whether a surcharge such as this complies with the Commission's view of sound ratemaking policy . . .". 579 F.2d at 669 n.14.

The D.C. Circuit in its decision sought to be reviewed here said, "[W]e disagree with the decision of the First Circuit . . ." (App. at 25a). The D.C. Circuit concluded that a finding of retroactivity "absolutely precludes approval of the surcharges" (*id.*).

> [W]e are not persuaded by any of the reasons cited by the First Circuit for its conclusion that the 'Commission has more latitude in shaping a lawful rate than it has recognized.' [Footnote omitted]. On the contrary, precedent establishes that the Commission is prohibited under the Federal Power Act from approving retroactive rate increases. [App., at 37a].

The Fourth Circuit has reached a similar conclusion. *Virginia Electric & Power Co.* v. *FERC,* 580 F.2d 710 (4th Cir. 1978) (per curiam). Thus, there is a direct conflict among the circuits, deserving resolution by this Court, on the proper application of the prohibition against retroactive ratemaking to fuel clause surcharges.

(2) This case raises an important question of Federal law that should be settled by this Court. Under the Commission's view of its authority as adopted by the Court below, the Commission lacks authority to allow electric utilities to be fully compensated for the expense of fuel burned to provide service to wholesale customers although under Commission policy stated in Order No. 517, they should be "made whole" for that expense. 52 F.P.C. at 1305-06. The effect of the Commission's decision in this case is to force Public Service to provide energy to its wholesale customers for two months without charging for the major portion of fuel expense incurred in generating that energy. If the facts of this case were exactly reversed and fuel costs had fallen below the base cost of the old fuel clause at the time it was superseded, under the decision of the Court below, the Commission would be powerless to order refunds of revenues which did not represent compensation for fuel expense (or any other expense for that matter).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

GEORGE F. BRUDER
ALBERT R. SIMONDS, JR.
BRUDER & GENTILE
1201 Connecticut Avenue, N.W.
Suite 708
Washington, D.C. 20036
(202) 452-1985

Counsel for Petitioner

August 1, 1979

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1592

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.
TOWNS OF ASHLAND AND WOLFEBORO, NEW HAMPSHIRE
VILLAGE PRECINCT OF NEW HAMPTON, NEW HAMPSHIRE,
INTERVENORS

No. 77-2004

APPALACHIAN POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 77-2005

APPALACHIAN POWER COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CITIES OF BEDFORD, ET AL., INTERVENORS

No. 78-1329

PENNSYLVANIA ELECTRIC COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

ALLEGHENY ELECTRIC COOPERATIVE, INC., INTERVENOR

No. 78-1330

METROPOLITAN EDISON COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PENNSYLVANIA PUBLIC UTILITY COMMISSION, BOROUGHS OF KUTZTOWN, GOLDSBORO, & LEWISBERRY, PENNSYLVANIA, ALLEGHENY ELECTRIC COOPERATIVE, INC., INTERVENORS

Petitions for Review of Orders of the Federal Energy Regulatory Commission

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Argued December 1, 1978

Decided May 3, 1979

Judgment entered this date

George F. Bruder with whom *Albert R. Simonds, Jr.* was on the brief, for petitioner in No. 77-1592.

Leonard W. Belter with whom *James B. Liberman* and *Donald K. Dankner* were on the brief, for petitioner in Nos. 78-1329 and 78-1330.

Edward J. Brady with whom *Edward A. Caine* and *Alfred Charles Koeppe* were on the brief, for petitioner in Nos. 77-2004 and 77-2005.

Lynn N. Hargis, Attorney, Federal Energy Regulatory Commission, with whom *Howard E. Shapiro*, Solicitor, Federal Energy Regulatory Commission, was on the brief, for respondent.

Robert C. McDiarmid with whom *Robert H. Bear* was on the brief, for intervenor, New Hampshire Electric Cooperative, Inc., et al. in No. 77-1592.

William C. Wise and *Robert Weinberg* were on the brief, for intervenor, Allegheny Electric Cooperative, Inc. and Boroughs in Nos. 78-1329 and 78-1330.

Gordon P. MacDougall was on the brief, for intervenor, Pennsylvania Public Utility Commission in No. 78-1330.

Ronald D. Eastman and *Jeffrey D. Komarow* were on the brief, for intervenor, the Boroughs of Kutztown, Goldsboro and Lewisberry, Pennsylvania in No. 78-1330.

Northcutt Ely and *Frederick H. Ritts* were on the brief, for intervenors, Cities of Bedford, et al. in No. 77-2005.

Also *Joseph G. Stiles, John J. Lahey* and *Philip R. Telleen*, Attorneys, Federal Energy Regulatory Commission, entered appearances, for respondent.

Before TAMM and MACKINNON, *Circuit Judges*, and JOHN H. PRATT,* *United States District Judge* for the United States District Court for the District of Columbia

Opinion for the Court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: Petitioner electric companies [1] seek review of ten orders of the Federal Power Commission (hereinafter "Commission").[2] In the challenged orders, the Commission refused to allow the electric companies to impose rate surcharges to compensate for alleged uncompensated fuel costs to which they allege they became entitled when they filed new rates based on fuel costs incurred in the billing month rather than for some prior period. The Commission held that the proposed surcharges amount to retroactive ratemaking, which is prohibited by the Federal Power Act. Petitioners counter that the surcharges are necessary because of changes in the companies' rate structure, and that they are not retroactive ratemaking.

The First, Third and Fourth Circuits have already ruled on this issue. The First Circuit [3] largely agreed with the position taken by the petitioners here. The

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Public Service Company of New Hampshire (Public Service), Pennsylvania Electric Company, Metropolitan Edison Company, and Appalachian Power Company.

[2] None of the orders has been officially reported. The Appendix to the Commission's brief contains the relevant orders. *See* Comm'n Br., App. 49-84.

[3] Maine Public Service Co. v. Federal Power Comm'n, 579 F.2d 659 (1st Cir. 1978).

Third [4] and Fourth [5] Circuits, on the other hand, held that it was proper for the Commission to reject the surcharges as prohibited retroactive ratemaking. We agree with the decisions by the Third and Fourth Circuits and affirm the Commission's orders, except those involving petitioner Appalachian Power Company.

I

Approved rates for electric service usually have two components. The "demand charge" covers the utility's fixed (capacity related) costs. The "energy charge" is designed to recover variable costs, primarily the cost of fuel, which recently has been increasing.

The energy charge also has two elements. The first element is the "basic energy rate." It recovers the "base cost" of fuel, which is an estimate of what fuel will be. The basic energy rate must be approved in advance by the Commission. The second element is the "fuel adjustment" charge. This charge is based on a formula designed to recover the difference between the base cost of fuel and the actual cost of fuel. A utility's fuel adjustment formula must be approved by the Commission, for it is considered part of the utility's filed rate. The monthly charge calculated under the fuel adjustment formula, however, is not subject to Commission approval. Thus, fuel adjustment clauses enable utilities to keep their rates in line with the current cost of their fuel without continually having to file for rate increases and decreases.

While a utility's fuel adjustment clause must fall within certain boundaries, much of the design is left to the utility. Basically, utilities have used one of two

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[4] Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm'n, No. 78-1185 (3d Cir., Oct. 6, 1978).

[5] Virginia Electric and Power Co. v. Federal Energy Regulatory Comm'n, 580 F.2d 710 (4th Cir. 1978).

types of fuel adjustment formula. "Cost of service" tariffs are designed to reimburse the utility for its actual fuel expenditures. These tariffs have the advantage of being accurate, but the inclusion of current costs in the monthly billings must be deferred while the utility collects and assimilates current data. "Fixed rate" tariffs incorporate a charge of a "predetermined price per unit based on costs incurred during a past test period, subject to some adjustments." [6] Fixed rate tariffs are less accurate than cost of service tariffs, but monthly billings need not be postponed until information on fuel costs is tabulated. Each type of fuel adjustment formula has its advantages and disadvantages, and the Commission allows a utility to use either one.

II

Until late 1975, the fuel adjustment clauses employed by the petitioners used fuel costs from up to six months earlier to compute current fuel adjustment charges.[7] For example, Public Service's January billing incorporated

[6] Public Service Co. of New Hampshire, No. 790, 3 (March 21, 1977) (hereinafter *Public Service No. 790*) in Comm'n Br., App. 53.

[7] Public Service's fuel adjustment charge was based on fuel costs from two months preceding the billing month. *Public Service No. 790, supra* at n.6, App. 62. The clause used by Pennsylvania Electric and Metropolitan Edison focused on "the three month totals for the period ending with the second calendar month preceding the billing month." "Resale Power Service Fossil Fuel Cost Adjustment Clause" Comm'n Br., App. 49 (Pennsylvania Electric), 50 (Metropolitan Edison) [hereinafter "Tariff of Pennsylvania Electric/Metropolitan Edison"]. Appalachian Power used two different fuel adjustment clauses. For most of its customers, the charge was based on the second preceding month. But the clause applicable to its affiliate the Kingsport Power Company was based on the cost of fuel in the preceding month. Comm'n Br. 18, App. Power Br. 8. Each of these fuel adjustment clauses is contained in an appendix to this opinion.

a fuel adjustment charge which reflected the difference between the base cost and the actual cost of fuel in the preceding November. Petitioners term this a "billing lag."

Petitioners were forced to amend their filed rates in late 1975 because of a change in Commission regulations.[8] Some of the petitioners chose this occasion to eliminate the "billing lag" in their fuel adjustment charges. That is, rather than computing current fuel adjustment charges on the basis of costs in a period prior to the billing period, the utilities switched to formulas that incorporated the actual cost of the fuel in the billing month. Thus, where under Public Service's old formula the January fuel adjustment charge was based on the cost of fuel in the preceding November, under the new formula, the January charge is computed on the basis of the actual January cost.

In addition to the changes just mentioned, petitioners requested approval for temporary rate surcharges. The surcharges are designed to recover "deferred charges" related to the "lag period" which petitioners allege are still owed by customers under the old (superceded) fuel adjustment clauses. Petitioners maintain that adoption of the new (non "billing lag") fuel adjustment clauses wiped out the "deferred charges" and made them uncollectable.

[8] The new regulation required utilities to include nuclear fuel costs in the base cost of fuel. "Order [No. 517] Amending Section 35.14 of the Regulations under the Federal Power Act," 52 F.P.C. 1304 (1974), 18 C.F.R. 35.14 (1977). Under the old regulations, nuclear fuel costs were not included in the "base cost" and therefore were not recovered by the "basic energy charge." The requirement that nuclear fuel be figured into the base cost resulted in some recovery of nuclear fuel costs by the basic energy charge. Of course, the difference between the actual cost of nuclear fuel and the "base cost" would still be reflected in the fuel adjustment charge.

Public Service's experience illustrates how elimination of the "billing lag" arguably makes "deferred charges" unrecoverable. Public Service's superceded fuel adjustment formula was based on the cost of fuel in "the second preceding month." [9] The January fuel adjustment charge reflected the cost of fuel in the preceding November. Therefore, recovery of the difference between the basic energy charge and November costs was "deferred" until the following January.[10]

Public Service's new fuel adjustment clause, which eliminated the "billing lag," became effective on January 1, 1976. Under the new "cost of service" clause the cost of fuel in January is accounted for in the January charge. The January charge no longer reflects the difference between the actual and estimated costs in November. Thus, the "deferred charge" from November, 1975, and December as well, became uncollectable under the new fuel adjustment formula. (Instead the higher January cost was collected). Petitioners argue that the surcharges are necessary to recoup costs for such periods, which were never included in any billings.[11]

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[9] Rate Schedule of Public Service, Comm'n Br. App. 36 (*see* Appendix, *infra*).

[10] The January charge would not recover the exact difference between the base cost and the actual cost of fuel in November because the quantity of fuel used differs from month to month, and the fuel adjustment factor was applied to kilowatt-hours used in the billing month. *See* discussion at III B., *infra*.

[11] Pennsylvania Electric, Metropolitan Edison, and Appalachian Power (in its tariff to its affiliate Kingsport Power) did not eliminate the billing lag in their fuel adjustment clauses. Despite this, they contend that the new Commission regulation requiring utilities to include the cost of nuclear fuel in the "base cost" made the "deferred charges" for nuclear fuel uncollectable. *See, e.g.*, Testimony of M.E. McCrary, Appendix of Appalachian Power A-64-66.

The Commission disagrees. It argues that since the "billing lag" was not eliminated, the utilities "would not be precluded by the raised base fuel cost from reflecting those past costs in future charges." Comm'n Br. 46.

We are skeptical of petitioners' argument on this point. For the purposes of this opinion, however, we will assume *arguendo* that inclusion of nuclear fuel costs in the "base cost" will cause some "deferred charges" to become unrecoverable.

The Commission refused to approve the surcharges. It held that (1) the proposed surcharges would be retroactive rate increases, and (2) the Federal Power Act prohibits retroactive ratemaking.[12]

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[12] The Commission stated:

> It is clear that the [superceded] fuel clause which became effective in January, 1973, was never intended to permit PSNH to charge its January customers for fuel costs incurred in November, 1972. The intent was to use the November experience, the most recently available data, as a measure of the January fuel expense which would be recoverable from customers using power in January.
>
> During the thirty-six months the superseded fuel clause was in effect each customer was billed monthly based on the rate determined by the fuel adjustment formula then in effect. After a customer had paid that bill the company had received everything it was entitled to receive under the then existing rate schedule. The fact that this rate schedule may not have adequately compensated the company for its costs incurred at that time does not permit us to retroactively increase that rate. It is well established that the Federal Power Commission has no authority to order reparations and can only set rates for the future.

Public Service No. 790, supra n.6, at 12, Comm'n Br., App. 62.

III

The primary issue in this case is whether imposition of the proposed surcharges would be retroactive ratemaking. Petitioners argue that the surcharges are not. They contend that the fuel adjustment clauses which were superceded were *cost of service* tariffs with deferred billing and therefore that they (petitioners) were entitled under the superceded clauses to be compensated for all incurred fuel costs;[13] and that since the surcharges merely enable petitioners to recover costs to which they were already entitled, but for which billing had been deferred, imposition of the surcharges would not constitute retroactive ratemaking.

The Commission disagrees with petitioners' characterization of the superceded fuel adjustment clauses. It contends that the old clauses were *fixed rate* rather than cost of service tariffs. That is, the superceded clauses established a "formula, based on past experience, *i.e.*, costs incurred during a prior test period, to" approximate the actual cost of fuel in the billing month.[14] In Public Service's case, for example, the costs in the second preceding month were a proxy for the costs in the billing month. Under this view, once a utility collected the fixed rate charge based on the costs in an earlier month it was fully paid, according to the rationale of its rate, for the service provided in the billing month. There were no "deferred charges" still owed by the customer. Under

[13] Counsel for Appalachian Power state in their brief: "The earlier fuel clauses recovered actual fuel expense incurred in any one month, but in a later billing month, whereas the updated fuel clauses recover actual fuel expense on a more current basis." Appalachian Power Br. 7. Similarly, counsel for Pennsylvania Electric wrote: "Penelec was expecting to recover the actual cost of fuel several months after those costs were incurred. . . ." Pennsylvania Electric/Metropolitan Edison Br. 32.

[14] Jersey Central, *supra* at n.4, at 4.

this analysis the requested surcharges would be retroactive rate increases.

Whether approval of the proposed surcharges would be retroactive ratemaking depends upon one's characterization of the superceded fuel adjustment clauses. If those clauses are viewed (as petitioners do) as cost of service tariffs with deferred billing, then the requested surcharges—which merely assure that the utilities recover their fuel costs—would not be retroactive rate increases. But if the superceded clauses are viewed (as the Commission does) as fixed rate tariffs which used past costs as a proxy for the actual current cost, then the proposed surcharges would indeed be retroactive rate increases. We believe that the superceded fuel adjustment clauses were fixed rate tariffs, and therefore, we agree with the Commission's finding that approval of the surcharges would be retroactive ratemaking.[15]

A

Petitioners make four arguments to support their claim that the superceded clauses were cost of service tariffs with deferred billing. First, they argue that the language of the clauses supports their interpretation. That is not true. While the clauses do not state that past costs are a proxy for current costs,[16] neither do they

[15] This conclusion does not apply to the superceded clauses of Appalachian Power Co. *See* III.C., *infra*.

[16] Petitioners' briefs focus on this point. Public Service's entire argument is as follows:

> [Public Service] vigorously denies that the record demonstrates that it had any intent to use the second preceding month's fuel costs in a proxy relationship. For evidence of such a relationship, one would look in the first instance to the language of the fuel clause itself.

state that the formulas are a method by which billing is deferred. Construed most favorably to the petitioners, the clauses are ambiguous. In light of this ambiguity, other evidence must be considered.

Petitioners' second argument is based on their use of "deferred fuel accounting." Public Service's deferred fuel accounting method "reflect[s] the amount to be collected for [fuel adjustment] charges in the month in which the increased fuel costs are incurred." [17] For example, the money to be received from a January billing is "entered in current revenues" for the preceding November.[18] Pennsylvania Electric and Metropolitan Edison use a similar (though slightly different) accounting system. According to their counsel:

> [The] accounting method defers recognition of actual expense . . . until such time as those actual

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> There is nothing in that language to imply such a relationship.

Public Service Br. 17. Similarly, counsel for Pennsylvania Electric and Metropolitan Edison states:

> The key language in Penelec's old fuel clause is the definition of fuel costs and sales for purposes of calculating the change from the base cost: "the three-month totals for the period ending with the second calendar month preceding the billing month." . . . Absolutely no language in this clause even hints that the past three-month period constitutes an "estimate" or "proxy" of what current month fuel costs will be. Had an "estimate" or "proxy" been intended, the clause would have so stated.

Pennsylvania Electric/Metropolitan Edison Br. 30. Thus, while petitioners' counsel claim that the language of the superceded clauses supports their position, petitioners only argue that this language is not explicitly contrary to their view.

[17] Public Service Br. 18, *quoting* from order of New Hampshire Public Utilities Commission.

[18] Public Service Br. 18.

> dollar amounts are billed under the fuel clause. Thus, the portion of the fuel cost that is included in Penelec's base rates is charged as an expense each month and the portion in excess of that base amount is deferred. The deferred costs are carried forward and recognized as expenses in the month in which the related fuel adjustment revenues are billed. Thus deferred fuel cost accounting properly matches costs and revenues.[19]

Petitioners contend that their use of deferred fuel accounting "would not make sense" [20] unless the superceded clauses were cost of service tariffs with deferred billing.

Petitioners' use of deferred fuel accounting is consistent with their claim that one month's fuel adjustment charge was merely deferred billing for an earlier month's costs. Nevertheless, petitioners' choice of this accounting method does not establish that the superceded clauses were cost of service tariffs with deferred billing. First, at least with respect to Public Service, the deferred fuel accounting method was not adopted until over one year after the superceded fuel adjustment clause became effective.[21] Thus, contrary to Public Service's counsel's contention, this accounting method is not "tangible evidence of the Company's intent" [22] at the time the superceded clause became effective.[23] Second, a company's

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[19] Pennsylvania Electric/Metropolitan Edison Br. 31. Appalachian Power also uses deferred fuel accounting. Testimony of M.E. McCrary, Appalachian Power App. A-67.

[20] Public Service Br. 18.

[21] Public Service Reply Br. 13. Comm'n Br. 38. Similarly, Appalachian Power did not use this accounting method until 1974, long after its superceded fuel clause became effective. Testimony of M.E. McCrary, Appalachian Power App. A-67.

[22] Public Service Br. 19.

[23] The companies' billing practice immediately after the fuel clauses became effective is relevant, and it strongly supports the Commission's interpretations. *See* 17-19, *supra*.

accounting method may or may not evidence its intention with respect to fuel adjustment charges. Deferred fuel accounting may have been adopted because the companies believed that their fuel adjustment clauses were cost of service tariffs with deferred billing. But adoption of this accounting method may have been for entirely different reasons. The switch to this accounting method resulted in an increase in assets on the books of the utilities and could have helped in sales of their securities at a time when they were hard hit by the foreign oil embargo.[24] Thus, a utility's choice of an accounting method does not necessarily control the Commission's decision as to the nature of the filed rate. Also, there is nothing in the Commission's prior approval of the field rate that requires a conclusion that it is a cost of service tariff. We are not persuaded, therefore, that petitioners' accounting method establishes that the superceded clauses merely deferred billing.[25]

Petitioners' third argument is based on Commission regulation 35.14(a)(1). This regulation provides that a fuel adjustment formula must reflect "the difference between the fuel cost . . . in the base period and in the current period. . . ."[26] Petitioners contend that this regulation "scrupulously require[s] that only actual fuel costs enter into this calculation [of the fuel adjustment

[24] *Cf.* Detroit Edison Company v. Michigan Public Service Comm'n and Attorney General, 82 Mich. App. 59 (1978), at Comm'n Br., App. 44. *See* Comm'n Br. 39.

[25] We note also that the Securities and Exchange Commission has refused to unequivocally endorse deferred fuel accounting because "uncertainties exist in some cases as to whether public utility commissions will permit the recovery of these deferred costs at a time when full new rate schedules are adopted." Series Release No. 166, Dec. 23, 1974, 20 SEC Docket 773 (Jan. 6, 1975), *quoted in* Intervenor New Hampshire Electric Cooperative Br. 14.

[26] 18 CFR § 35.14(a)(1) (1977).

charge]."[27] Since only "actual" costs can be reflected in the formula, petitioners maintain that the reference to past costs must have been a way to defer billing, rather than as a proxy for current costs.

The flaw in this argument is the assumption that "current costs" can not be estimated. If this assumption were correct, then the regulation would have the effect of prohibiting fixed rate tariffs entirely. Petitioners cite no language in the regulation that supports their assumption and there is no basis for us to conclude that the Commission would have instituted such a major change from its past practice in less than explicit language. A much more reasonable conclusion, which is consistent with Commission practice, is that "current costs" is a term of art. In cost of service tariffs, "current costs" are indeed the actual costs. But in fixed rate tariffs, "current costs" means an estimate of costs based on past experience. Therefore, we reject the argument that because of regulation 35.14 the superceded clauses must be viewed as cost of service tariffs.

Finally, petitioners contend that in light of the Commission policy of making utiilties whole the superceded fuel adjustment clauses must be viewed as cost of service tariffs. We acknowledge, of course, that the goal of fuel adjustment clauses is to accurately compensate utilities for their fuel costs, and that cost of service tariffs are the best way of doing this. The Commission, however, does not require that utilities use cost of service tariffs. Within certain boundaries, utilities are permitted to design their own fuel adjustment clauses. The risk involved in the selection of a fuel adjustment clause is on the utiilty.[28] Thus, when a utility chooses a fixed rate tariff, a kind of fuel clause that has long been permitted, Com-

[27] Pennsylvania Electric/Metropolitan Edison Br. 30.

[28] *See* discussion at 27-28, 31, *infra*.

mission policy does not require that courts transform the clause into a cost of service tariff.

In short, none of petitioners' arguments warrants the conclusion that the superceded fuel adjustment clauses were cost of service tariffs with deferred billing. We therefore turn to the arguments in support of the Commission's decision.

B

We concur, for three reasons, in the Commission's judgment that the superceded fuel adjustment clauses were fixed rate tariffs. First, the scheme of the superceded fuel adjustment clauses belies petitioners' claim that the clauses were cost of service tariffs with deferred billing. Petitioners acknowledge that the superceded clauses were based on formulas. Their argument is that those formulas merely postponed recovery of the actual cost of service. An examination of the superceded clauses, however, indicates that was not the case. If the clauses were cost of service tariffs with deferred billing, then the formulas would have applied the fuel adjustment factor based on a particular month's fuel costs to the amount of energy used by the customer during that month.[29] But instead, the clauses involved in the tariffs filed in this case (except Appalachian) applied the fuel adjustment factor (which was based on fuel costs in a prior month or months) "to all kilowatt-hours supplied *during the billing month.*" [30] Thus, the fuel adjustment

[29] For example, Public Service's superceded clause was based on the costs in the "second preceding month," *e.g.*, November fuel costs were reflected in the January fuel adjustment charge. If the clause were intended to defer recovery of November's costs until January, then the January charge would reflect both (1) November costs and (2) November power consumption. *See* Appendix, A-1.

[30] Tariff of Pennsylvania Electric/Metropolitan Edison, *supra* n.7, Appendix, A-3, A-5; Rate Schedule of Public Service, Comm'n Br., App. 36, Appendix A-1. *But see* discussion of fuel adjustment clauses used by Appalachian Power, *infra* at III.C.

charge that was used was *not* based on the cost of fuel that had been used to generate the power for which users were billed. Since customer usage varies from month to month, this mismatch—applying a fuel adjustment factor based on one month to kilowatt-hours used during another month—would not lead to exact recovery of actual fuel expenses.[31] Thus, the superceded clauses did not simply defer recovery of the cost of fuel. The clauses brought about a charge that differed from actual cost. This result is inconsistent with petitioners' claim that the clauses were cost of service tariffs with deferred billing. But the result squares with the Commission's view that the clauses were fixed rate tariffs which used fuel costs in a prior period as a proxy for actual current costs.

Second, petitioners' billing practice is inconsistent with their claim that the superceded fuel adjustment clauses were merely a means of deferred billing. If these clauses were a method of deferred billing, then the utilities would not have begun billing under the superceded clauses immediately after the clauses became effective. Rather, they would have waited until the "billing lag" had elapsed.

[31] For example, the Commission states in its brief:

> [Public Service's] own interpretation of its fuel clause would result in substantial imprecision in fuel cost recovery. Because past fuel costs are applied to current kilowatthours under the clause . . . , there is a mismatch of fuel costs and kilowatthour usage. As a result, the record shows that [Public Service] would have overrecovered fuel costs by as much as $288,565 for two months even under its present theory of its prior fuel clause.

Comm'n Br. 42. Public Service's comptroller, Elroy Littlefield, acknowledged that this mismatch produces imprecise recovery of costs. J.A. 26-27.

Yet the petitioners [32] began billing under the superceded fuel adjustment clauses the first month they were effective.

Public Service's billing practice illustrates this inconsistency. Its superceded fuel adjustment formula became effective in January, 1973. Public Service began billing in accordance with that formula immediately. Under petitioners' analysis, the January bill was really a deferred charge for the "second preceding month"—November, 1972. But as the Commission notes, Public Service could not have intended to charge for November, 1972, because its customers had already paid for service received in November, and therefore the January charge "would have constituted retroactive rate-making and would have been barred." [33] If Public Service really intended its fuel adjustment clause to be a means of deferred billing, then the proper procedure would have been to start billing under that clause in March, 1973. The only reasonable explanation for Public Service's decision to bill under the superceded clause the first month it was effective is the one arrived at by the Commission: the superceded clauses were fixed rate tariffs which used costs incurred during a prior test period as a proxy for actual current costs.

Petitioners' have no real answer to this point. They lamely contend that "the initial billings show no more than a lack of refined thinking on the correct application of the clause." However, we cannot ascribe such carelessness in applying the clauses as their application is in conformance with their wording and they were obviously

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[32] *Public Service No. 790* 12, at Comm'n Br., App. 62 (Public Service); Pennsylvania Electric Co., Docket No. ER76-607, at 12 (December 19, 1977), at Comm'n Br., App. 82 (Pennsylvania Electric and Metropolitan Edison). There is no record on Appalachian Power's billing practice.

[33] *Public Service No. 790* 12, at Comm'n Br., App. 62.

drafted in a very careful manner.[34] Petitioners have generously offered to refund the extra money billed during the first months the superceded clauses were effective in exchange for the much greater amounts they would receive if their arguments about deferred billing were accepted. We are not persuaded. One's thinking need not be very "refined" to understand that if the purpose of a fuel adjustment clause is to defer billing, then billing must be deferred.[35] Petitioners' decision to bill during the first months the superceded clauses were effective is a clear indication that petitioners did not consider the clauses to be cost of service tariffs with deferred billing.

Finally, the language and tone of the superceded fuel adjustment clauses is consistent with the Commission's conclusion that they were fixed rate tariffs. It would have been very easy for petitioners, who wrote the clauses, to have included explicit language indicating that the fuel clauses merely deferred billing for one month's fuel costs until a subsequent month. But the clauses do not contain such language. Instead they provide, for example, that a "fuel cost adjustment factor shall be applied . . . in accordance with the formula set forth. . ." [36] This emphasis on a formula, which as we indicated above, did not result in an exact recovery of fuel costs, belies petitioners' claim that the clauses merely deferred billing for a few months.

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[34] Public Service Br. 20.

[35] Essentially, petitioners' argument is that the fuel adjustment bill received by a Public Service customer in March is actually the fuel adjustment charge for January. Billing of the January charge was deferred for two months. If this were really Public Service's intent, then it is obvious that customers should not have been billed for a fuel adjustment charge in January, which was the first month the superceded clause was in effect.

[36] Tariff of Pennsylvania Electric/Metropolitan Edison, *supra* n.7; Appendix A-3, A-5.

For these reasons, we believe that the Commission properly characterized the superceded fuel adjustment clauses as fixed rate tariffs. Since we agree with the Commission, it is not necessary to address the niceties between various standards of review. *Associated Press v. Federal Communications Commission*, 452 F.2d 1290, 1295-96 (D.C. Cir. 1971). But even if we did not agree with the Commission, reversal on this point would be inappropriate. The Commission's interpretation of fuel adjustment clauses is entitled to a considerable amount of deference. As Judge Leventhal wrote for the court in *Gulf-States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 457 (D.C. Cir. 1975):

> where the decision involves the interpretation of the parties' intent as revealed in the language of a contract, it is proper to defer to the Commission's expertise if its decision is "amply supported both factually and legally." United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, *supra*, 358 U.S. at 114, 79 S.Ct. at 201.

Accord: *City of Kaukauna, Wis. v. Federal Energy Regulatory Comm'n*, 581 F.2d 993, 997 (D.C. Cir. 1978) (approached agency interpretation with deference but finally rejected it); *New England Power v. Federal Energy Regulatory Comm'n*, 571 F.2d 1213, 1219 (D.C. 1977); *Appalachian Power Co. v. Federal Power Comm'n*, 529 F.2d 342, 351 n.67 (D.C. Cir.), *cert. denied*, 429 U.S. 816 (1976). In the instant case, even if one were somewhat persuaded by petitioners' arguments, there is no question that the Commission's finding is "amply supported." [37]

[37] The First Circuit reversed the Commission's determination that a surcharge was impermissible retroactive ratemaking. *Maine Public Service, supra.* Apparently, one reason for that decision was the court's belief that whether the surcharge was a retroactive rate increase was a close question. Judge Campbell wrote:

C

The Commission held hearings before it concluded that the surcharges proposed by Public Service, Pennsylvania Electric and Metropolitan Edison are retroactive rate increases. No such hearings were held involving Appalachian Power. Instead, relying on its decision in *Public Service No. 790* [38] the Commission "summarily disallow[ed] the proposed fuel surcharge. . . ." [39] Appalachian Power contends that even if the Commission is correct with respect to the other petitioners, rejection of Appalachian Power's surcharges without a hearing was error. We agree.

The Commission may reach decisions without holding evidentiary hearings only when there are no material facts in dispute. *Citizens for Allegan County, Inc. v.*

> To be sure it can be argued, as does the Commission, that the surcharge is merely a belated attempt to collect in a later year sums that were overlooked by the earlier fuel clause. But it can also be argued with some force that the prior fuel formula anticipated that customers would eventually have to pay the very sum which the surcharge has now assessed in a different form. . . . [I]t may be contended that the past formula did not set a rate that was too low. The trouble was more one of deferred collection, a question of timing. . . .

579 F.2d at 667.

We disagree with this novel approach. Commission decisions are not subject to reversal merely because they decide close questions. On the contrary, as was indicated above, the Commission's interpretations are entitled to a considerable amount of deference.

[38] Cited at n.6, *supra.*

[39] Appalachian Power Co., Docket No. ER77-325 (June 30, 1977) at Appendix of Appalachian Power A-18 (municipal customers); Appalachian Power Co., Docket No. ER77-426 (June 30, 1977), at Appendix of Appalachian Power, A-72 (Kingsport affiliate).

Federal Power Commission, 414 F.2d 1125, 1128 (D.C. Cir. 1969); *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1220 (D.C. Cir. 1975). On this record, material facts are in dispute and Appalachian Power's formula as drafted does not determine the issue.

The central factual issue is whether the two superceded fuel adjustment clauses used by Appalachian Power were cost of service tariffs with deferred billing or fixed rate tariffs. Our decision that the clauses used by the other petitioners were fixed rate tariffs is based primarily on two facts. First, the formulas mismatched the costs from an earlier month with the power consumption in the billing month. Second, petitioners' billing was not deferred. In Appalachian Power's case these facts are not established in the record.

1. *Mismatch.* The fuel adjustment clauses that were used by Public Service, Pennsylvania Electric and Metropolitan Edison plainly applied the fuel adjustment factor (which was based on fuel costs in a prior month) "to all kilowatt-hours supplied during the billing month." [40] Thus there was a mismatch of costs from one month with fuel usage in a later month.

The record does not conclusively establish that Appalachian Power's superceded fuel adjustment clauses prescribed such a mismatch. For example, the clause in Appalachian Power's filed rates for its wholesale customers provided that if the cost of fuel exceeded the base cost, then "an additional charge . . . equal to the product of the actual kiloWatt-hours used and a fuel

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[40] *See* n.30. The language in Public Service's superceded clause (Comm'n Br., App. 36) is not clear on this point, but the record establishes that there was a mismatch in Public Service's billing. JA 26-27.

clause adjustment factor . . . shall be made. . . ." [41] Appalachian Power acknowledges that the fuel adjustment factor was based on the costs in the second preceding month.[42] Its fuel adjustment factor, therefore, was essentially the same as that used by the other petitioners.

But while the fuel adjustment factor was similar, the fuel consumption that this factor was applied to may have been different. Appalachian Power's clause (see Appendix A-7) provides that the factor should be applied to "the actual kiloWatt-hours used," but the clause does not indicate which month's "actual kiloWatt-hours" is intended. Perhaps the factor was applied to the kilowatt-hours consumed in the billing month, just as in the clauses used by the other petitioners. But it is also possible that the factor was applied to the kilowatt-hours used in the second preceding month—the same month that was the basis for the fuel adjustment factor. If the latter were true, then the fuel adjustment charge would have accurately recovered the actual cost of service on a deferred basis.

The testimony of Appalachian Power's witnesses supports its contention that there was no mismatch in Appalachian Power's fuel adjustment clauses. One witness stated:

> The terms of the [superceded] clause reflected, as a practical matter a billing lag; i.e. if fuel cost in one month were above (or below) the base rate level, then this increased fuel cost would be recovered in the rates for the next succeeding month.[43]

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[41] "Appalachian Fuel Clause for Service to Virginia and West Virginia Customers," Appalachian Power Br., App. 2, Appendix A-7.

[42] Appalachian Power Br. 8.

[43] Testimony of Ronald H. Hively, No. 77-426, Appalachian Power App. 53.

Similarly, another Appalachian Power witness indicated that under the superceded fuel adjustment clause the exact difference between the base cost and actual cost of fuel in one month was recovered in a subsequent month.[44]

Since the fuel adjustment clause is ambiguous, and since Appalachian Power's witnesses support the company's claim that there was no mismatch in billing under the superceded clauses, we are unable to agree with the Commission that there are no material facts in dispute. At the same time, the testimony provided by Appalachian Power does not establish that there was not a mismatch. On remand, therefore, the Commission should determine the actual billing practice used by Appalachian. If the Commission finds that the fuel adjustment factor was applied to fuel consumption in the billing month, then this would support the Commission's belief that the clause was a fixed rate tariff. But if the superceded clause was applied in a way that resulted in exact recovery of actual costs (*e.g.*, no mismatch), then this would support the company's claim that the clause was a cost of service tariff with deferred billing.[45]

2. *Immediate billing of fuel adjustment charges.* With respect to billing practices, Public Service, Pennsylvania Electric and Metropolitan Edison all started billing customers for fuel adjustment charges in the first month that their superceded clauses were effective. This billing practice is inconsistent with their claim that the fuel adjustment clauses were a method of deferred billing.[46]

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[44] Testimony of M.E. McCrary, No. ER 77-426, Appalachian Power App. 63, Table A, column D.

[45] The other Appalachian Power fuel clause involved here, which was part of the rates to its Kingsport Power affiliate, does not appear to be capable of exact recovery of past costs. But in view of the direct testimony by one of Appalachian Power's witnesses to the contrary, we believe that a fact issue is raised here as well. *See* Appalachian Power App. 63.

[46] *See* III.B., *supra*.

But since no hearings were held on Appalachian Power's billing practice, we have no record evidence to review. Thus, as with the mismatch question, this factual issue is still in dispute as to Appalachian.

In summary, it is not certain, on this record, that Appalachian Power's superceded clauses mismatched costs and consumption. Similarly, there is no evidence as to Appalachian Power's billing practice. In short, the primary reasons that the other petitioners' superceded clauses were found to be fixed rate tariffs do not appear on this record to be true as to Appalachian Power. Neither are such reasons disproved. The Commission's rejection of Appalachian Power's proposed surcharges based solely on the Commission's holding with respect to the other petitioners, therefore, was erroneous. There is still a dispute as to whether Appalachian Power's superceded clauses were fixed rate tariffs. A remand on that question is therefore necessary.

IV

Thus far, we have determined that the superceded clauses were fixed rate tariffs, and therefore that the proposed surcharges are retroactive rate increases.[47] The second major issue to be resolved is whether this finding absolutely precludes approval of the surcharges. The Commission held that it does, relying on the rule against retroactive ratemaking. The First Circuit, however, suggests that the rule need not be strictly applied, and that in some cases retroactive ratemaking is permissible.[48] Since we disagree with the decision of the First Circuit, and since the rule against retroactive ratemaking was

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[47] This statement does not apply to the fuel adjustment clauses that were used by Appalachian Power. *See* III.C., *supra*.

[48] *See Maine Public Service*, *supra* at n.3.

barely mentioned in the opinions by the Third and Fourth Circuits,[49] we will address this issue.

A

This court stated in *Nader v. Federal Communications Commission*, 520 F.2d 182, 202 (D.C. Cir. 1975) that "[i]t is . . . a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." Though this rule is applied in a variety of settings,[50] it is most prominent in ratemaking under the Federal Power Act, 16 U.S.C. § 824d (1977) and the Natural Gas Act, 15 U.S.C. § 717c (1977).

The Federal Power Act gives the Commission authority to review

> [a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission. . . .

16 U.S.C. § 824d(a) (1977). If the Commission finds that existing rates are unreasonable, then it may establish reasonable rates "to be *thereafter* observed and in force. . . ." 16 U.S.C. § 717d(a) (emphasis added). The provisions of the Natural Gas Act are "virtually identical." As a result of the similarity in the two Acts, cases applying the rule against retroactive ratemaking to ratemaking under one Act have been viewed as authority for applying the rule to ratemaking under the other Act as well. *Indiana & Michigan Electric Co. v.*

[49] *See* cases cited at n.4 & 5, *supra*.

[50] *Nader* involved a proposed increase in telephone rates. The rule was also stated in Payne v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 901, 910-11 (D.C. Cir. 1968), which involved bus fares.

Federal Power Commission, 502 F.2d 336, 344 n.2 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).[51]

Perhaps the leading case dealing with ratemaking under the Federal Power Act is *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.*, 341 U.S. 246, 254 (1951). Therein, the court cited the legislative history of the Act for the proposition that "Congress withheld from the Commission power to grant reparations." Justice Frankfurter's dissent (on other grounds) elaborated on this same point:

> Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low.

341 U.S. at 258. Similarly, in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956), the court stated:

> while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not iself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.

[51] Though we have no doubt about the applicability of this rule to ratemaking under both statutes, the case for applying the rule to ratemaking subject to the Federal Power Act is even stronger than the case for applying it to ratemaking under the Natural Gas Act. Congress specifically eliminated a section of the Federal Power Act that would have authorized "the issuance of reparation orders." S. Rep. No. 621, 74th Cong., 1st Sess. 20 (1935). Cases applying the rule against retroactive ratemaking in the context of the Natural Gas Act have not referred to the legislative history of that statute.

Finally, this Circuit stated in *Indiana & Michigan, supra,* that the "Supreme Court has interpreted [the Federal Power Act] as precluding the Commission from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable." 502 F.2d at 345.

The rule against retroactive ratemaking is forcefully stated in cases involving the Natural Gas Act. The Supreme Court wrote in *Federal Power Commission v. Tennessee Gas Co.*, 371 U.S. 145, 152-53 (1962):

> [A] rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed. . . . The company having initially filed the rates and . . . failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including . . . its losses where its filed rate is found to be inadequate.

Accord: *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959), *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 618 (1944), *Gillring Oil Co. v. Federal Energy Regulatory Comm'n* 566 F.2d 1323, 1325 (5th Cir. 1978), and *State Corporation Comm'n of Kansas v. Federal Power Comm'n*, 215 F.2d 176, 184 (8th Cir. 1954). In summary, cases under both the Federal Power Act (which applies here) and the Natural Gas Act establish the principle that only prospective ratemaking is allowed. A rate designed to recoup past losses is retroactive and illegal.

B

Basically, petitioners do not contest the validity of the rule against retroactive ratemaking. The force of their argument is, as Appalachian Power stated, that the "proposed surcharge is not a reparations award." [52] But to a certain extent, petitioners pick up on the theme enunciated in the First Circuit's *Maine Public Service* opinion: that the "Commission has more latitude in shaping a lawful rate than it has recognized." [53]

The First Circuit's reasoning appears to be that while retroactive ratemaking is generally forbidden, in light of the unique circumstances involved in fuel adjustment clause cases, the rule should not be applied inflexibly.[54] Judge Campbell explained:

> the validity of the surcharge presents a unique policy question for the Commission rather than a black or white legal issue. The surcharge falls somewhere between a species of the forbidden "retroactive rate-making" and an acceptable adaptation of the earlier fuel clause to special conditions. . . .
>
> The difficulty in classification stems not only from the inflationary rise in fuel costs that triggered the problem, but from the fact that fuel cost adjustment clauses are themselves unique animals that are not easily assimilated to classical rate-making principles. We believe that the Commission erred insofar as it regarded itself as automatically precluded by prior judicial decision such as *Montana-Dakota* or *Hope Natural Gas* from approving the surcharge.

579 F.2d at 668. Thus, the First Circuit held that the Commission erred when it rejected the surcharge proposal solely on the basis of the rule against retroactive ratemaking. In so ruling the Court stated that the

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[52] Appalachian Power Reply Br. 10; Pennsylvania Electric/Metropolitan Edison Reply Br. 6.

[53] 579 F.2d at 669.

[54] The First Circuit also stated that the surcharge might not be a retroactive rate increase. 579 F.2d at 667. The argument is discussed *supra* at n.37.

Commission should have paid more attention to whether the surcharge was "just and reasonable," and it ordered a remand on the reasonableness issue.

The First Circuit offered four reasons for its conclusion that the rule against retroactive ratemaking was not controlling in cases involving fuel adjustment clauses. First, "fuel adjustment clauses are . . . unique animals" [55] designed " 'to make utilities whole,' and the surcharge can now be defended as simply implementing the same policy." [56] Second, a Commisison regulation permits "deviation from the prescribed operation of fuel adjustment clauses . . . for good cause shown. . . ." [57] Third, "the Commission does allow in other circumstances for 'after the fact matching of actual costs and revenues,'. . . ." [58] Finally, "the Commission . . . has permitted a type of refund outside of the ordinary rate-suspension context." [59] We are not persuaded by any of these arguments.

1. *"Unique Animals."* The purpose of fuel adjustment clauses is to enable utilities to recover their fuel costs without constantly having to file amendments to their tariffs. According to the Commission, "[t]he philosophy underlying the design of fuel adjustment clauses is to increase or decrease the charge to the customer by an amount reflecting the actual increase or decrease in the cost of fuel." *New England Power Co.*, 48 F.P.C. 899, 921 (1972). Following the lead of the First Circuit in *Maine Public Service, supra*, petitioners argue that since fuel adjustment clauses are "unique animals" intended

[55] 579 F.2d at 668 (see block quote in the preceding paragraph).

[56] 579 F.2d at 667-68.

[57] 579 F.2d at 668.

[58] *Id.* at n.13.

[59] *Id.* at 668.

to ensure accurate recovery of fuel costs, the goal of accurate recovery should take precedence over the rule against retroactive ratemaking. Therefore they maintain that reasonable retroactive rate increases, which merely permit a utility to recover fuel costs missed by the prior filed rate, should be allowed.[60]

If we were writing on a clean slate this argument would have some attraction. But there is nothing new about the goal that utility rates should accurately reflect costs and ensure a reasonable return on investment. And despite this goal, courts have consistently held that while the Commission can not require a utility to adopt an unfavorable rate, it has no authority to retroactively allow an increase when the utility has voluntarily adopted a non-compensatory rate.[61] Neither petitioners nor the First Circuit cite any cases to the contrary.

In addition, although fuel adjustment clauses are intended to enable utilities to recover the actual cost of fuel, the particular design of a clause is left to the utility. The Commission permits both fixed rate and cost of service tariffs. The goal of accurate recovery of actual fuel costs is best met by cost of service tariffs, but petitioners opted instead for fixed rate formulas.[62] Having made that choice, they now argue that they should be exempt from the rule against retroactive ratemaking because the rate they chose did not recover their costs. Perhaps the Commission should, in the interest of accurate recovery, permit only cost of service tariffs. The fact is, however, that fixed rate tariffs are permitted, and petitioners chose to use them. We simply can not accept the

[60] Public Service Reply Br. 4-8; Pennsylvania Electric Reply Br. 18-20.

[61] *See* cases cited in text at IV.A. *supra.*

[62] *See* III.B. *supra.*

argument that petitioners' improvident choice entitles them to an exemption from the well established rule against retroactive ratemaking.

2. *Commission Regulation.* The First Circuit implies that 18 C.F.R. § 35.14(a)(10)(1974) permits retroactive ratemaking. Section 35.14(a) delineates filing requirements for fuel adjustment clauses. Section 35.14(a)(10) provides that:

> Whenever particular circumstances prevent the use of the standards provided for herein, or the use thereof would result in an undue burden, the Commission may, upon application under § 1.7(b) of the rules of practice and procedure and for good cause shown, permit deviation from these regulations.

We do not understand this provision as allowing retroactive ratemaking. Since nothing in the regulation relates to the rule against retroactive ratemaking, it is hard to see how allowing a deviation from its filing requirements could have any substantive impact on the rule. Moreover, the Supreme Court has interpreted the Federal Power Act as prohibiting retroactive ratemaking, and we do not believe that the Commission in its regulations had either the intention or the authority to exceed this statutory limitation. Therefore, section 35.14(a)(10) merely permits deviation from the filing requirements for prospective rather than retroactive rate changes.

3. *After the Fact Matching.* Petitioners maintain that Commission approval of after the fact matching in other areas belies the agency's claim that retroactive ratemaking is uniformly prohibited. Petitioners cite two examples of authorized after the fact matching: purchased gas cost adjustment (PGA) clauses and research demonstration and development (RD&D) expense adjustment clauses.[63]

[63] Petitioners also point to the surcharge permitted in Commission opinion 699-G, 52 F.P.C. 1551 (Nov. 29, 1974). We agree with the Commission, however, that the surcharge permitted in Opinion 699-G was not a retroactive rate increase. According to one of the opinions authorizing such a surcharge, it merely allows a pipeline company to "recover producer increases resulting from Opinion 699 *more expeditiously* than would be the case under the normal operation of its PGA clause. . . ." United Gas Pipe Line Co., 52 F.P.C. 1578, 1580 (Nov. 29, 1974) (emphasis added).

PGA clauses permit utilities to "recover or return" the difference between actual fuel costs and the amount recovered by the fuel charge.[64] RD&D expense adjustment clauses recover prior research and development expenditures.[65] According to the First Circuit

> Though these adjustment provisions differ from fuel cost adjustment clauses in several respects their retrospective nature is similar to that of the adjustment clause, and their existence indicates that the Commission may not be so devoid of the power to match past costs and present revenues as it here maintains.

Maine Public Service, supra, 579 F.2d at 668 n.13.[66]

The existence of PGA and RD&D clauses conclusively establishes that the Commission permits after the fact matching. The First Circuit errs, however, by equating after the fact matching with retroactive ratemaking. All cost of service clauses involve after the fact matching of costs and charges, and there is no question that the Commission can, under the Federal Power Act, approve cost of service clauses. The Commission's approval of

[64] PGA clauses are authorized in 18 C.F.R. § 154.38(d)(iv)(a) & (b), which apply to natural gas companies.

[65] 18 C.F.R. § 35.22(e)(3); 42 Fed. Reg. 30156 (June 13, 1977).

[66] Only PGA clauses were mentioned in *Maine Public Service.* This argument, however, is equally applicable to RD&D clauses.

both Public Service's and Appalachian Power's new cost of service fuel adjustment clauses is an example of this. Both clauses allow the utility to conform the fuel adjustment charge to fuel costs after those costs have been incurred. They are not retroactive rate increases, however, because both clauses were prospectively approved.

The question before us is not whether cost of service clauses with their after the fact matching can be approved. Rather, it is whether the Commission may retroactively change a fixed rate clause to a cost of service clause. The prospective application of the previously approved cost of service PGA and RD&D clauses can not support an affirmative answer to this question.[67] Therefore we reject the argument that PGA and RD&D clauses are precedent for permitting retroactive rate increases.

4. *Extra-ordinary Refunds.* In *Indiana & Michigan Electric Co. v. Federal Power Commission*, 502 F.2d 336, 343-44 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), this court held that the Commission unlawfully "delayed the effective date of I&M's rate filings. . . ." The court ordered "I&M's customers . . . to pay retroactive rate increases for the five-month period during which the Commission's unlawful suspension was in effect." The First Circuit states that this is an example in which the rule against retroactive ratemaking was ignored.

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[67] Petitioners argue that PGA and RD&D clauses and the proposed surcharges involved here are similar in that each is designed to match costs and services. Pennsylvania Electric/Metropolitan Edison Reply Br. 9-10. This is true. The difference between PGA and RD&D clauses on the one hand, and the proposed surcharges on the other, is that the former prospectively provided for after-the-fact matching, whereas imposition of the latter (the surcharge) would be a retroactive shift from a "fixed rate" to a "cost of service" tariff.

The Commission persuasively responds that its power to correct its own mistakes does not establish the existence of a power to remedy insufficient rate filings by utilities. The Supreme Court specifically addressed the difference between these two powers. Justice Douglas wrote for the Court in *United Gas v. Callery Properties*, 382 U.S. 223, 229-30 (1965):

> We also conclude that the Commission's refund order was allowable. We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission "has no power to make reparation orders," *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618, its power to fix rates under § 5 being prospective only, *Atlantic Refining Co.* v. *Public Service Comm'n, supra*, at 389, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 200-201. An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.

Thus, as *United Gas* and *Indiana & Michigan* indicate, the Commisison may "undo what is wrongfully done by virtue of its order."[68] But the Commission may not permit a utility to retroactively increase its filed rate.[69]

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[68] 382 U.S. at 229.

[69] It is somewhat ironic that *Indiana & Michigan* is cited for the proposition that retroactive rate increases are per-

In summary, then, we are not persuaded by any of the reasons cited by the First Circuit for its conclusion that the "Commission has more latitude in shaping a lawful rate than it has recognized." [70] On the contrary, precedent establishes that the Commission is prohibited under the Federal Power Act from approving retroactive rate increases.

V

In summary, we affirm the Commission orders involving Public Service, Pennsylvania Electric and Metropolitan Edison. The Commission correctly determined that their proposed surcharges are illegal retroactive rate increases. We remand the orders dealing with Appalachian Power Company. The facts that established that the superceded fuel adjustment clauses used by the other petitioners were fixed rate tariffs have not been conclusively proven with respect to Appalachian Power. Therefore, on this record we can not hold that Appalachian Power's proposed surcharges are retroactive rate increases.

Judgment Accordingly.

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missible. After rehearing, the court modified its original order and provided that

> 1. I&M may not collect retroactive rate increases for the five-month period from the effective date of its rate filing [during which the rate was unlawfully suspended].

502 F.2d at 344. The court adhered to its view that the rate had been illegally suspended. Nevertheless, the court withdrew its order permitting retroactive rate increases because such increases "would create considerable hardship for I&M's customers [who] . . . are precluded by federal law . . . from retroactively raising their rates. . . ." *Id. Indiana & Michigan*, then, turns on the rule against retroactive ratemaking —the very doctrine that the First Circuit claims it undercuts.

[70] 579 F.2d at 669.

EXHIBIT B
5th Revision
February 1, 1975

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

RATE SCHEDULE
FOR TRANSMISSION SERVICE
AT WHOLESALE FOR RESALE

MONTHLY RATE APPLICABLE TO SALES AT EACH DELIVERY POINT

Demand Charge: $2.95 per kilovolt-ampere of maximum demand.

Energy Charge: 0.73¢ per kilowatt-hour.

Fuel adjustment: There shall be an upward or downward adjustment applied to all energy billed under the resale service rate based upon the difference between (i) the actual costs of fossil fuels burned in generating stations owned by the SELLER and in other generating stations from which the SELLER purchases capacity and energy under agreements to enable it to fulfill its power requirements, and (ii) the fixed base costs of such fuels computed at a cost per fossil fuel generated kilowatt-hour of $0.00457045. The charge or credit resulting from this difference shall be adjusted to reflect energy losses incurred in the delivery or resale service sales. The adjusted charge or credit shall be applied to kilowatt-hours billed pursuant to meter readings taken in any calendar month and shall be in an amount determined monthly based upon costs and quantities of fuels burned and all other required data taken from or applicable to the second preceding month. The adjustment shall be computed to the nearest one-thousandth cent, ($0.00001) per kilowatt-hour.

Mimimum Charge: The demand charge but not less than $200.00 per month.

Low Voltage Delivery Charge: For any delivery point on the low voltage side of a distribution substation of the SELLER, the demand charge shall be increased by $0.25 per month per kilovolt-ampere of maximum demand, and the maximum demand and kilowatt-hour energy use recorded at the delivery voltage shall each be increased by 2.5 percent. Such delivery at low voltage may be terminated by the SELLER at any time by giving the PURCHASER not less than one (1) year's written notice specifying a date for termination.

Pennsylvania Electric Company
FPC Electric Tariff
Original Volume No. 1

Revised Sheet No. 15
Superseding Second Revised Sheet No. 15
Revised—12/17/73

RESALE POWER SERVICE
FOSSIL FUEL COST ADJUSTMENT CLAUSE

A fossil fuel cost adjustment factor shall be applied to each kilowatt-hour supplied under this tariff. This fuel cost adjustment determined to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month.

$$A = \left(\frac{Fc}{Gc} - \frac{Fb}{Gb}\right) \times \frac{Gc}{Sc} \times \frac{1}{1-T}$$

Where A = Adjustment factor in mills per kilowatt-hour to be applied to each kilowatt-hour supplied under this tariff.

F = The cost of fossil fuel determined as the sum of Accounts 501 and 547 (less handling costs) in the current (c) and base (b) periods.

G = Net kWh generation by fossil fuels in the current (c) and base (b) periods.

S = Sales shall be all kWh's sold excluding inter-system sales in the current (c) period.

$\frac{Fb}{Gb}$ = Base fossil fuel cost (less handling costs) of 4.254 mills per kilowatt-hour.

T = The applicable Pennsylvania gross receipts tax.

The "Fc", "Gc" and "Sc" factors are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month.

The "T" factor is to be determined for the billing month.

Minimum bills shall not be reduced by reason of this fuel cost adjustment clause. This clause shall be applied to all kilowatt-hours supplied, and such charge shall be an addition to any minimums applicable.

Metropolitan Edison Company
FPC Electric Tariff
Original Volume No. 1

Second Revised Sheet No. 17
(Superseding First Revised Sheet No. 17)
And Orig. Sh. No. 17

5-8-75

RESALE POWER SERVICE
FOSSIL FUEL COST ADJUSTMENT CLAUSE

A fossil fuel cost adjustment factor shall be applied to each kilowatt-hour supplied under this tariff. This fuel cost adjustment determined to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month.

$$A = \left(\frac{Fc}{Gc} - \frac{Fb}{Gb}\right) \times \frac{Gc}{Sc} \times \frac{1}{1-T} \times L$$

Where A = Adjustment factor in mills per kilowatt-hour to be applied to each kilowatt-hour supplied under this tariff.

F = The cost of fossil fuel determined as the sum of Accounts 501 and 547 (less handling costs) in the current (c) and base (b) periods.

G = Net kWh generation by fossil fuels in the current (c) and base (b) periods.

S = Sales shall be all kWh's sold excluding inter-system sales in the current (c) period.

$\frac{Fb}{Gb}$ = Base fossil fuel cost (less handling costs) of 6.035 mills per kilowatt-hour.

T = The applicable Pennsylvania gross recepits tax.

L = A factor for adjustment of losses to the delivery voltage.

The "Fc", "Gc" and "Sc" factors are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month.

The "T" factor is to be determined for the billing month.

The "L" factor is 0.94 for delivery at transmission voltages and is 0.97 for delivery at distribution voltages.

Minimum bills shall not be reduced by reason of this fuel cost adjustment clause. This clause shall be applied to all kilowatt-hours supplied, and such charge shall be an addition to any minimums applicable.

Effective May 10, 1974

APPALACHIAN FUEL CLAUSE FOR SERVICE TO VIRGINIA AND WEST VIRGINIA WHOLESALE CUSTOMERS AS FILED AND IN EFFECT WHEN THE $1,587,000 OF UNBILLED FUEL EXPENSE WAS INCURRED

No. 77-2004

Fuel Clause

When the unit cost of fuel (Fm/Sm) used to meet Appalachian Power Company's Net Energy Requirement less losses (Sm) is above or below the base unit cost of 3.2710 mills per kiloWatthour (Fb/Sb), an additional charge or credit equal to the product of the actual kilo-Watthours used and a fuel clause adjustment factor (A) shall be made, where "A", calculated to the nearest 0.0001 mill per kiloWatthour, is as defined below:

$$\text{Adjustment Factor (A)} = \frac{Fm}{Sm} - \frac{Fb}{Sb}$$

In the above formula "F" is the expense of fossil and nuclear fuel in the base (b) and current (m) periods; and "S" is the kWh sales in the base and current periods, all as defined below:

Fuel Costs (F) shall be the cost of:

(a) fossil and nuclear fuel consumed in Appalachian Power Company's plants, and Appalachian Power Company's share of fossil and nuclear fuel consumed in jointly owned or leased plants;

(b) the actual identifiable fossil and nuclear fuel costs associated with energy purchased for reasons other than identified in (c) below;

(c) the net energy cost of energy purchases, exclusive of capacity or demand charges (irrespective of the designation assigned to such transaction) when

such energy is purchased on an economic dispatch basis (including therein shall be such costs as the charges for economy energy purchases and the charges as a result of scheduled outage, (all such kinds of energy being purchased by Appalachian Power Company to substitute for its own higher cost energy); and less

(d) the cost of fossil and nuclear fuel recovered through inter-system sales including the fuel costs related to economy energy sales and other energy sold on an economic dispatch basis.

Sales (S) shall be equated to the sum of (a) generation, (b) purchases, (c) interchange-in, less (d) energy associated with pumped storage operations, less (c) inter-system sales referred to in (d) above less (f) total system losses.

Sales (S) shall be modified to reflect losses of 4.67% associated with Appalachian Power Company's deliveries to customers served under this schedule.

The adjustment factor developed according to the preceding paragraphs may be further modified to allow the recovery of gross receipts or other similar revenue based tax charges occasioned by the fuel adjustment revenues.

The cost of fossil fuel shall include no items other than those listed in Account 151 of the Commission's Uniform System of Accounts for Public Utilities and Licensees. The cost of nuclear fuel shall be that as shown in Account 518, except that if Account 518 also contains any expense for fossil fuel which has already been included in the cost of fossil fuel, it shall be deducted from this account. All reference to the Commission's Uniform System of Accounts for Public Utilities and Licensees shall be to such Uniform System of Accounts for Public Utilities and Licensees as is in effect as of December 1, 1975.

APPALACHIAN FUEL CLAUSE FOR SERVICE TO KINGSPORT POWER COMPANY AS FILED AND IN EFFECT WHEN THE $736,000 OF UNBILLED FUEL EXPENSE WAS INCURRED

9.02 The energy rates in the rate schedule specified under Section 8.01 above are based upon a Weighted Average Fuel Cost of eight cents ($0.08) per million Btu. In the event the Weighted Average Fuel Cost for any month exceeds eight cents ($0.08) per million Btu by at least one mill, said energy rates for the next succeeding month shall be increased by an adjustment factor of 0.0125 mills for each such one mill of such excess Weighted Average Fuel Cost. In the event the Weighted Average Fuel Cost for any month is less than eight cents ($0.08) per million Btu by at least one mill, said energy rates for the next succeeding month shall be decreased by 0.0125 mills for each such one mill that the Weighted Average Fuel Cost is less than eight cents ($0.08) per million Btu; provided, however, that said adjustment factor of 0.0125 mills shall be subject to adjustment as hereinafter provided.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 790

Docket No. ER76-285

Public Service Company of New Hampshire

Opinion and Order Determining Legality of Proposed Fuel Adjustment Clause Surcharge

Issued: March 21, 1977

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. ER76-285

Public Service Company of New Hampshire

OPINION NO. 790

Appearances

George F. Bruder for Public Service Company of New Hampshire

E. David Doane and *Harry H. Voigt* for Concord Electric Company and Exeter & Hampton Electric Company

Daniel Guttman, Tom McHugh and *Sandra Spiegel* for New Hampshire Electric Coop; Cities of Ashland and Wolfeboro, New Hampshire, Village Precinct of Hampton, New Hampshire

Thomas N. McHugh for New Hampshire Corporation, Wolfeboro and New Hampton

Eugene R. Elrod for the Staff of the Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Docket No. ER76-285

Public Service Company of New Hampshire

Opinion and Order Determining Legality of Proposed Fuel Adjustment Clause Surcharge

(Issued March 21, 1977)

OPINION NO. 790

On November 21, 1975, Public Service Company of New Hampshire (PSNH) tendered for filing proposed rate changes in seven of its F.P.C. rate schedules. PSNH asserted that the changes were required in order to conform the rate schedules to the Commission's fuel clause regulations as amended by Commission Order No. 517.[1] The proposed changes were accepted for filing and suspended until January 1, 1976, when they became effective subject to refund. The Commission granted the intervention petitions filed by the customers whose rates would be affected by the proposed changes, New Hampshire Electric Cooperative, Inc., the towns of Ashland and Wolfeboro, New Hampshire, and the village precinct of New Hampton, New Hampshire (Customers).

The Commission designated for hearing two issues arising from the proposed changes: a temporary surcharge designed to recover $1,636,210 which PSNH contends are the

[1] 52 F.P.C. 1304 (1974).

costs incurred by it and not recovered from its customers for the months of November and December, 1975, as a result of the two month lag in its billing system under the superseded fuel adjustment clause and; PSNH's use of fuel cost estimates to permit current month billing. Both Staff and the Intervenors object to the proposed surcharge. Only the Intervenors object to the proposed use of fuel cost estimates.

Initial Decision

The initial decision by Presiding Administrative Law Judge Thomas L. Howe finds that the proposed surcharge should not be approved. The decision further finds that PSNH's use of fuel cost estimates is not objectionable and should be approved.

The initial decision points out that under the old fuel adjustment clause the actual costs per KWH experienced in the second preceding month were compared with the base fuel cost to find the adjustment factor which was then applied to the current month energy billing determinates. Through this system, fuel costs incurred by PSNH were reflected two months later in its bills to its wholesale customers. Under its new fuel adjustment clause PSNH has chosen to implement current month billing, thereby eliminating the two month lag. On January 1, 1976, the current month billing system went into effect and PSNH argues that it had not yet recovered the fuel adjustment costs for November and December, 1975. PSNH's proposed surcharge is designed to recover the fuel costs incurred by PSNH for November and December, 1975.

The initial decision notes that as it was originally filed by PSNH, the surcharge was designed to recover $1,737,177 in twelve monthly payments. PSNH has offered two modifications to its proposal: one would spread the recovery of this amount over a two to three year period to avoid cash flow problems for its wholesale customers, and the other

offers to reduce the total amount of recovery to $1,636,210. The reduction in the amount to be recovered represents the amount already recovered by PSNH under its superseded fuel clause in January and February, 1973, on the basis of fuel costs incurred in November and December, 1972, the two months preceding the effective date of its superseded fuel adjustment clause.

The Presiding Administrative Law Judge points out that there are two basic types of rate tariffs used by utilities: the cost of service tariff, in which sellers are reimbursed penny for penny for costs incurred in providing service and are given a specified rate of return on these costs, and the fixed rate tariff in which customers pay a predetermined price per unit based on costs incurred during a past test period, subject to some adjustments. The decision points out that under a fixed rate tariff there is no guarantee that current costs will be recovered or that nothing more than such current costs will be recovered.

The initial decision indicates that fuel adjustment clauses permit the utility to regularly change the test period for fuel costs without receiving prior F.P.C. approval. This constant updating of the test period, according to the Presiding Administrative Law Judge, relates fuel charges more closely to fuel costs, but does not mandate the recovery of exact fuel costs. Like any fixed rate tariff, the fuel adjustment clauses can only approximate actual costs. Only a cost of service tariff can yield an exact result. The Administrative Law Judge notes that the collections under PSNH's fuel clause are determined by the costs for a prior period, a characteristic of fixed rate tariffs.

In his opinion the Administrative Law Judge points out that in the last two months of operation under PSNH's superseded fuel adjustment clause, the amount collected was not determined by its costs in those months, but by its costs in the preceding months. The decision states that this is characteristic of fixed rate tariffs which provide current

compensation on the basis of costs incurred during a past period. The decision points out that the failure of a fixed rate tariff to recover the full amount of costs during a certain period is no grounds for providing for the collection of the unrecovered portion by an upward adjustment of rates for a later period through a surcharge or any other mechanism. To do so, according to the Administrative Law Judge, would be to permit retroactive ratemaking.

The decision notes that, while fuel adjustment clauses are designed to more closely match fuel charges and fuel costs, they were not designed to relieve the utility of all of the risks of doing business. A utility cannot be expected to be protected from all of the changes in its cost of operation and should not be permitted to make-up for unrecovered fuel costs from a prior period through the use of a surcharge.

On the question of the use of fuel cost estimates to permit current month billing the decision concluded that, although Order No. 517 does not specifically provide for estimates, that order does not bar their use to determine monthly fuel costs. PSNH's proposed clause would use actual costs for the first two-thirds of the month and estimated costs for the last one-third of the month. Any differential between the estimated cost and the actual cost will be adjusted in the next months billing. The initial decision concludes that the use of fuel cost estimates is not objectionable and is necessary if PSNH is to implement a fuel adjustment clause based on its current costs.

Position of the Parties

PSNH filed a brief on exceptions urging that the Administrative Law Judge's decision be reversed as to the surcharge issue. PSNH contends that the surcharge is a just and reasonable rate making provision that does equity between the customer and the power supplier. PSNH points out that the surcharge will only permit recovery of its costs,

and to disallow the surcharge would be to permit the consumer to escape payment of the reasonable costs incurred in supplying power.

PSNH alleges that the fuel charge is designed to serve the Commissions stated fuel clause objective of matching, as closely as possible, fuel costs with fuel clause recovery. PSNH maintains that fuel clauses are intended to pass on to customers the increases or decreases in the fuel costs incurred by the utility. PSNH questions whether, if fuel costs had fallen during this period, its customers would be willing to waive their rights to a credit to the fuel adjustment clause, just as they would have PSNH give up its right to recover prudently incurred costs because costs increased during this period. PSNH contends that this fuel adjustment clause surcharge in no way constitutes retroactive ratemaking. PSNH contends that if the surcharge is considered retroactive ratemaking then, the fuel adjustment concept itself is retroactive ratemaking. PSNH argues that lagging fuel clauses and deferred recovery provisions have long been approved by the Commission and have never been considered to be retroactive ratemaking.

PSNH contends that there is nothing in the superseded fuel clause which would indicate that a proxy relationship was contemplated by the company, in that the fuel costs from a past period would be substituted for present costs in determining what amount should be recovered under the fuel adjustment clause for a given month. PSNH asserts that the company's accounting, that accompanied the lag in billing provision, demonstrates positively that a proxy relationship was not contemplated. PSNH argues that its accounting demonstrates just the opposite, that PSNH always intended to recover these costs. The company points to an order by the New Hampshire Public Utilities Commission which requires that the deferred revenues under the fuel clause be treated as though they had been collected during the current billing month, in other words that revenues to be collected in February 1976, be treated as though collected in December 1975. PSNH maintains that if any analogy is to be drawn, the proper analogy would present the basic energy charge as a fixed rate and the fuel clause as a cost of service rate, since the basic energy charge is fixed at a rate per KWH according to test year costs, while the fuel clause seeks penny for penny recovery of increases above the base cost of fuel embodied in the basic energy rate.

PSNH points out that the fuel clause by its terms provided that November and December 1975 costs would be recovered in January and February 1976. The surcharge proposed herein merely spreads out over twelve months the recovery of costs previously mandated for recovery over two months. To deny recovery of these charges would, in effect, change the superseded fuel adjustment clause retroactively.

In its brief, PSNH points to numerous state regulatory commission decisions approving fuel clause surcharges as a proper means of recovering unbilled fuel costs. PSNH cites, and includes in an appendix to its brief, the decisions of thirteen state commissions and indicates that, to the best of its knowledge, only one state commission has disallowed a surcharge because it would constitute retroactive rate making. PSNH states that it has examined the statutes of the thirteen jurisdictions involved and had found that generally, like the F.P.C., the state regulatory agencies may only make prospective changes in rates.

PSNH contends that the Commission's own policies under the Natural Gas Act permit similar filings by natural gas pipeline companies. PSNH contends that the purchased gas cost adjustment provisions under the Natural Gas Act enable a regulated pipeline to flow through changes in certain of its purchased gas costs to its customers. PSNH points out that the Commission's PGA clause policy permits pipeline company's to employ a surcharge to recover

increases in their purchased gas costs over a six month amortization period. PSNH argues that the PGA surcharge is the rate making analog to the PGA six month amortization accounting, and that its proposed surcharge constitutes the rate making analog to the accounting that PSNH followed with its two month lagging fuel clause.

PSNH argues that the procedure suggested by the Intervenors would not eliminate a need for the surcharge. PSNH contends that there is no accounting solution to the deferral problem that would magically avoid an adverse impact to someone. And since fuel has been purchased and used, someone, either the shareholder or the consumer, must pay for it and no accounting methods can avoid this impact on one of these groups.

In a brief opposing exceptions PSNH supported the Judge's conclusion in favor of the use of fuel cost estimates. PSNH points out that estimated fuel costs are not proscribed by Order No. 517. PSNH maintains that current month billing, as it is proposing, would best serve the objectives of Order No. 517, in that it would most closely match fuel costs and revenues. PSNH alleges that its methodology for determining its fuel adjustment clause uses actual data to the extent that it is available and that the limited estimates, which will be corrected on the next bill, are completely reasonable.

A brief on exceptions was filed by the customers of PSNH. While strongly supporting the Presiding Administrative Law Judge's rejection of the proposed surcharge the customers contend that the initial decision erred in accepting the use of estimated fuel costs. Customers contend that, although Order No. 517 does not specifically prohibit the use of estimates, it presents a strong policy argument against the use of such estimates. The customers point out that Order No. 517 recognized that a lag in collections for fuel expenses would provide some incentive for utilities to bargain for favorable fuel prices. Customers contend that

PSNH is seeking to defeat this mechanism through current month billing and through the use of estimates.

Customers filed a brief opposing exceptions and urging that the Judge be affirmed as to the surcharge issue. Customers contend that the fuel adjustment clause was never intended to recover in each month the cost of the second preceding month, but instead was designed to recover the increased cost of the current month, based on the cost of the second preceding month. Customers point to the operation of the clause during the first two months of its effectiveness as evidence of the fact that past costs served as a proxy for current month recovery. During the first two months of the operation of the superseded fuel clause, January and February 1973, PSNH recovered its fuel costs based on its costs for November and December 1972. If, as PSNH now asserts, the clause was designed to recover actual costs of the second preceding month, Customers point out that no collections should have been made under the clause for either January or February, 1973, because these costs were incurred before the fuel adjustment clause became effective.

Customers contend that PSNH's use of deferred fuel accounting is merely an expedient after the fact attempt to alter the basis of the superseded clause. The customers point out that PSNH's witness conceded that its customers had been billed, and made payment, to the company under the superseded fuel clause for each and every month that the clause was in effect. Customers point out that under the proposed surcharge new customers just now joining the system would be paying for fuel costs incurred before they were on the system while customers who leave the system would avoid paying for fuel used for their benefit. Customers argue that while the purpose of the fuel adjustment clause is to closely match fuel cost and revenues, the Commission has always recognized that an exact match of cost and revenues is virtually impossible and cannot be expected. Customers contend that Order No. 517 discusses the

desirability of retaining within the fuel clause mechanism an incentive for utilities to bargain for lower fuel costs, and this incentive is the built in lag between the time costs are incurred and the time the revenue is collected.

Customers contend that the Federal Power Act clearly bars the utility from collecting any amounts retroactively which were not payable under the utility's filed rates. Customers point out that retroactive rate changes are barred by the Federal Power Act and are beyond the jurisdiction of the Commission. Customers point out that if the surcharge is approved PSNH would collect fourteen month fuel charges over a twelve month period and would be collecting under two separate fuel adjustment clauses during the same period of time.

Customers maintain that the order of the New Hampshire Public Utilities Commission requiring the adoption of deferred fuel expense accounting is no indication that PSNH expected recovery of these costs. Customers point to the lapse of time between the entry of the state commission order and the filing of the instant surcharge as pursuasive evidence that PSNH did not view the state order as authority for the surcharge. Customers note that PSNH unsuccessfully attempted to file two wholesale rate increases during 1975 and in neither case did it attempt to impose the surcharge. Customers point out that the New Hampshire Public Utility Commission's order was an accounting order only and did not speak to the proper rate treatment to be accorded the unbilled fuel expenses. Customers contend that in abandoning the superseded fuel clause and adopting the current fuel clause, PSNH has replaced a fixed rate tariff with a cost of service tariff. According to customers, a consequence of this replacement, voluntarily undertaken by PSNH, is the fact that it is now precluded from collecting any further revenue under the superseded fuel clause.

Customers contend that PSNH's reliance on state regulatory decisions is irrelevant. Customers argue that PSNH has not attempted to compare the state statutes at issue with the Federal Power Act. In any event, they maintain that state regulatory decisions should not be considered precedent for decisions to be rendered under the Federal Power Act.

Customers contend that the alternate accounting treatment they have proposed would make the surcharge unnecessary. Customers propose that if the company were to increase the base cost of fuel while retaining the lagging feature of the superceded fuel clause, the balance in the deferred fuel expense account could be eliminated without the surcharge. Customers contend that this "fold-in" approach has been used by many other utilities to reduce the amount of revenues subject to the fuel clause.

A brief opposing exceptions was filed by the Commission Staff. Staff first states that, while its brief does not discuss the Presiding Administrative Law Judge's findings on the issue of fuel cost estimates, it agrees with those findings and believes that they should be affirmed. Staff also supports the initial decision's disallowance of the proposed surcharge.

Staff contends that the Commission's concept of a just and reasonable fuel clause was never designed to guarantee penny for penny recovery of fuel costs. Staff argues that because the Commission has permitted utilities to use fuel adjustment clauses as a form of relief against abrupt variations in fuel costs, this should not be considered a guarantee of penny for penny recovery. Staff points out that had PSNH continued to operate under its old fuel clause this problem, of recovering for the last period, would never have arisen. Staff contends that it would be highly inequitable to impute to today's customers the allegedly unrecovered costs associated with yesterday's service.

Staff submits that the proposed surcharge would be in violation of the Federal Power Act because it would constitute retroactive ratemaking. Staff points out that a utility is entitled to no rate other than the filed rate, and that this Commission does not have the authority to grant reparations for past losses. Staff argues that the prior fuel clause, together with the various demand and energy charges contained within the previously filed rates, completely and unequivocally fix PSNH's rights to be remunerated for all service provided to its wholesale customers prior to January 1, 1976. Staff argues that to approve this surcharge would permit PSNH to make up for unrecovered fuel costs from a prior period and would be the equivalent of designing rates for the future to make up for prior operating losses, a practice that is barred by the Federal Power Act.

Staff maintains that under PSNH's fuel clause the second preceding months fuel costs are intended as a proxy for the current months cost. Staff maintains that the rates are composed of two parts: a basic charge related to the level of consumption and a variable fuel charge based on the contractual formula. Staff points out that it is the fuel adjustment formula, not the monthly fuel adjustment factors derived from the changing cost of fuel, which constitutes the rate.

Staff argues that PSNH's reliance on purchased gas adjustment regulations is misplaced. Staff points out that PGA clauses within filed rates actually provide for an after the fact matching of costs and revenues whereas the previously filed fuel adjustment clause of PSNH did not. Staff also notes that purchased gas cost adjustments are not automatic, as fuel costs adjustments are, but are permitted only after an appropriate filing with the Commission and only semi-annually. Staff further notes that PGA rates are not inappropriate under the filed rate doctrine because there the filed rates permit such after the fact reconciliation of costs and revenues, while this is not the case with the fuel adjustment clause provisions.

Discussion

The questions raised by PSNH's proposed fuel adjustment clause surcharge have also been raised in other proceedings now pending before this Commission.[2] In reaching our decision in this proceeding we have also reviewed, where appropriate, the briefs filed on this issue in those proceedings and given consideration to the authorities cited therein.

The purpose of fuel adjustment clauses is to permit a utility to pass along, without the necessity of a complete rate filing, the changes in the cost of fuel.[3] In this connection the Commission has stated:

> We would observe in this connection that while every fuel adjustment clause should be designed to produce as nearly as practicable a mirror image of the cost of fuel upon the price of energy which is delivered by an electric utility, we must expect ripples in that reflection. Because of the time factor involved in gathering and assimilating data, expressing the number of dollars spent for gallons of oil or tons of coal in terms of dollars per kilowatt hour, and mailing and collecting

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[2] *Delmarva Power and Light Company*, Docket No. ER76-494 (Phase I), Initial Decision January 12, 1977; *Virginia Electric and Power Company*, Docket No. ER76-415, Initial Decision October 12, 1976; *Maine Public Service Company*, Docket No. E-8264, Initial Decision September 30, 1976; *Metropolitan Edison Company*, Docket Nos. ER76-209, ER76-492, Initial Decision February 15, 1977. The surcharge question is also one of the issues involved in a full rate case, *Gulf Power Company*, Docket No. E-8911, Initial Decision October 18, 1976.

[3] Order No. 517, *Order Amending Section 35.14 of the Regulations under the Federal Power Act*, 52 F.P.C. 1304 (1974).

> the resulting billings, there must be some imprecision in matching fuel expense dollars with delivered energy revenue dollars for any given date or any given period of time.[4]

It is clear from this early statement by the Commission on fuel adjustment clauses that the Commission never contemplated that fuel adjustment clauses should guarantee penny for penny recovery. Although fuel adjustment clauses are designed to reflect increased fuel costs through rate adjustments, fuel clauses are not designed to relieve the utility of all of the risks of doing business. A utility cannot be expected to be fully protected from all changes in its cost of operation that may reflect upon its profits.

The filed rate doctrine, as promulgated by the Supreme Court holds that a public utility, "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission . . . ." [5] Fuel adjustment clauses are part of the filed rates. Although the monthly charge under the fuel adjustment clause may vary, the formula used to compute that charge does not vary. "Thus, it is the fuel adjustment formula, not the monthly fuel adjustment factors derived from the increased (decreased) cost of fuel, which constitutes a part of the rates." [6] PSNH's superseded fuel adjustment clause provided for a built in two month lag before any adjustment was computed. When PSNH filed its new fuel adjustment clause, and shifted to current month billing, the old fuel clause was superseded and rates must now be calculated in accordance with the new fuel adjustment clause, which

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[4] *New England Power Company*, 48 F.P.C. 899, 908-09 (1972).

[5] *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246, 251 (1951).

[6] *Electric and Water Plant Board of the City of Frankfort, Kentucky, et al.* v. *Kentucky Utilities Company*, Opinion No. 760 (April 29, 1976) mimeo at 15.

is now the filed rate. The old fuel clause was in effect for 36 months and PSNH has recovered its costs for 36 months under that fuel adjustment formula.

When the superseded fuel adjustment clause took effect, in January, 1973, collections under that clause were begun that month. The fuel adjustment rate for that month was calculated on the basis of fuel cost data for November, 1972, two months prior to the fuel clauses' effective date. The data for the second month prior to the fuel clauses becoming effective constituted the test period data on which the monetary rate was based. The Presiding Administrative Law Judge correctly noted that if the fuel adjustment clause had been intended to be used to recover these costs, rather than using these costs as test period data, this recovery would have constituted retroactive ratemaking and would have been barred. The use of the November and December, 1972, costs as a basis for determining the fuel adjustment charge for January and February, 1973, is characteristic of a fixed rate tariff, which provides current compensation on the basis of costs incurred during a past period. Each month, while the superseded fuel clause was in effect, the rate authorized thereby was applied to every kilowatt hour sold during that month. There could be no collectable accumulation of fuel expense at the end of the life of the fuel adjustment clause unless there was, at its inception, a right to collect for then past fuel expenses. It is clear that the fuel clause which became effective in January, 1973, was never intended to permit PSNH to charge its January customers for fuel costs incurred in November, 1972. The intent was to use the November experience, the most recently avialable data, as a measure of the January fuel expense which would be recoverable from customers using power in January.[7]

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[7] *State of North Carolina ex rel Utilities Commission and Duke Power Company, Applicant* v. *Rufus L. Edmisten, Attorney General*, —— N.C. ——, —— S.E. 2d —— (February 1, 1977).

During the thirty-six months the superseded fuel clause was in effect each customer was billed monthly based on the rate determined by the fuel adjustment formula then in effect. After a customer had paid that bill the company had reecived everything it was entitled to receive under the then existing rate schedule. The fact that this rate schedule may not have adequately compensated the company for its costs incurred at that time does not permit us to retroactively increase that rate. It is well established that the Federal Power Commission has no authority to order reparations and can only set rates for the future.[8]

> The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.[9]

PSNH has voluntarily decided to change to current month billing and eliminate the two month lag. While Order No. 517 required utilities to refile their fuel adjustment clauses to conform to its provisions, it did not mandate a change to current month billing. Had PSNH maintained its old system of a two month lag the problem of a surcharge would never have arisen. PSNH would have consistently received current month revenues based on the costs incurred during the second preceding month. While PSNH may consider itself to be, under this method, two months behind in collecting revenue under the fuel adjustment clause, they are no more behind than is any utility which collects current revenues based on costs incurred during a past test period.

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[8] *F.P.C.* v. *Hope Natural Gas Company*, 320 U.S. 591, 618 (1944); *State Corporation Commission of Kansas* v. *F.P.C.*, 215 F.2d 176, 184 (8th Cir. 1954).

[9] *F.P.C.* v. *Tennessee Gas Transmission Company*, 371 U.S. 145, 153 (1962).

PSNH's reliance on the alleged similarity between fuel adjustment clauses and purchased gas cost adjustment provisions is inapposite. PGA adjustments differ from fuel adjustment clauses in several respects. PGA adjustments are not automatically passed through and included in the customer's rates; they must be filed with the Commission. PGA's can be filed no more frequently than semi-annually, while fuel adjustment clauses take effect monthly. PGA clauses are designed to provide for after the fact matching of actual costs and revenues. PGA clauses permitting this matching of actual costs with revenues are included as part of the filed rates under a pipeline's tariff unlike the fuel adjustment clause at issue here.

PSNH relies heavily on several state regulatory decisions permitting the imposition of a surcharge. The only state court of last resort to rule on a question such as this was the Supreme Court of North Carolina which recently ruled that a surcharge, like the one at issue here, could not legally be imposed.[10] Of all the cases reproduced in the appendix to the brief on exceptions filed by PSNH, only the Florida Public Service Commission dealt with the question of retroactive rate making. That Commission ruled, "to allow the company to institute a surcharge designed to recoup a loss occasioned by the operation of the adjustment clause in the past would be to exceed the scope of this Commission's powers." [11] Several of the Commission orders cited by PSNH give no legal or factual background and merely state that the proposed surcharges are approved. In examining these various state proceedings we do not intend to indicate that we in any way consider ourselves bound

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[10] *State of North Carolina ex rel Utilities Commission and Duke Power Company, Applicant* v. *Rufus L. Edmisten, Attorney General, supra* note 7.

[11] *Florida Public Utilities Company*, Docket No. 74119-EU, Order No. 6179, June 24, 1974.

by any decision of a state commission. Because of the dearth of precedent applicable to this case we felt that it would not be inappropriate for us to examine the state decisions cited.

Approval of PSNH's proposed surcharge would require that customers of PSNH today pay for costs incurred previously. Fuel costs, like other components of the utilities rate, should be borne by the users of the service in the month in which the expense is incurred and may not properly be charged to subsequent users of the utilities services. PSNH's proposed surcharge would require that customers who are now entering the system, and were not customers of PSNH when these costs were incurred, pay the fuel costs incurred before they were on the system. Any customer who has left the PSNH system after these costs were incurred, but before the imposition of the surcharge, will have avoided paying for the cost of the fuel used to generate his power.

We do not find PSNH's proposed use of fuel cost estimates to be objectionable. PSNH's current month fuel cost billing process uses the actual fuel costs for the first two-thirds of the current month and estimated costs for the last one-third of the month and adjusts the total to reflect the difference, if any, between the estimated and the corresponding actual costs for the preceeding month. PSNH's use of estimates will be extremely limited, and any errors will be corrected on the next bill, which is as quickly as possible. We will approve PSNH's limited use of estimated fuel costs in this proceeding. Our approval of the use of estimated fuel costs by PSNH in this proceeding, which involves using estimates for only one-third of a month, does not mean that we will in the future approve the use of fuel cost estimates for longer periods or for other purposes.

In accord with our discussion herein, we will affirm the decision of the Presiding Administrative Law Judge and reject PSNH's proposed surcharge. We will however permit PSNH to use fuel cost estimates under its proposed tariff for the limited period of time each month that will be involved.

The Commission finds:

Consistent with our discussion herein the initial decision of November 17, 1976, should be affirmed.

The Commission orders:

(A) The initial decision of November 17, 1976, is affirmed.

(B) Within 15 days after refunds have been made PSNH shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with a summary of such information for the total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 790-A

Docket No. ER76-285
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Opinion and Order Denying Rehearing

Issued: May 20, 1977 DC-A-22

FUEL ADJUSTMENT CLAUSE

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: James G. Watt, Acting Chairman; Don S. Smith, and John H. Holloman III.

Docket No. ER76-285
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

OPINION NO. 790-A

Opinion and Order Denying Rehearing

(Issued May 20, 1977)

On April 20, 1977, Public Service Company of New Hampshire (PSNH) filed an application for rehearing of Commission Opinion No. 790. Opinion No. 790 denied a request by PSNH to impose a temporary fuel adjustment clause surcharge designed to recover revenues PSNH contended were not recovered from its customers during the months of November and December 1975. PSNH alleged that the surcharge was designed to recover costs incurred, but unrecovered, due to the two month lag in its billing system under the superseded fuel adjustment clause.

PSNH alleges that the Commission's opinion is inconsistent with the Commission's past emphasis on achieving the highest technically practical degree of accuracy in matching fuel costs and fuel cost recovery. PSNH alleges that this policy is cast aside in favor of sterile legal logic. PSNH argues that the Commission's decision will discourage the updating of base fuel costs and will lead to utilities recovering ever-increasing portions of their fuel costs through their fuel adjustment clause.

PSNH believes that the Commission erred in analogizing fuel adjustment clauses to fixed rate tariffs. PSNH states

that the proper analogy would present the basic energy charge as a fixed rate and the fuel clause as a cost of service rate. PSNH points to an order of the New Hampshire Public Utilities Commission, in connection with a parallel lagging billing provisions effective at the retail level, which shows that recovery of these costs was always contemplated by the company. PSNH argues that the accounting treatment of the revenues received under the fuel clause should be considered in determining whether or not recovery was anticipated.

In its application PSNH alleges that the recovery of fuel costs will be for a thirty-six month period that does not coincide with a thirty-six month period during which the clause was effective. PSNH contends that recovery will be for the thirty-six months from November 1972 to October 1975 rather than the January 1973 through December 1975 period during which the clause was effective. PSNH points to its offer to reduce the amount of the surcharge by the amount of revenues recovered under the fuel clause based on November and December 1972 data. PSNH concedes that the collection of the fuel clause revenues for those two months was an error and the Commission could approve the surcharge and properly condition it to rectify that error. PSNH argues that the surcharge was merely designed to complete the job that the lagging billing provision was to do, make the company whole for fuel costs expenses incurred.

The argument that denial of the surcharge opens the way to future injustices ignores the fact that PSNH is now on a current month billing basis, which is properly analogous to a cost of service tariff. PSNH uses actual costs for the first two-thirds of the month and estimated costs for the final one-third of the month and adjusts the total to reflect the difference, if any, between the estimated and the corresponding actual costs for the preceding month. This method reflects the actual cost of fuel virtually immediately

and eliminates the possibility of future build-up of unrecovered costs or an excess of recovery.

PSNH would have this Commission rely on an accounting order of the New Hampshire Public Utilities Commission as binding precedent for a rate determination. The accounting procedure ordered by a state commission at the retail level cannot serve as precedent for a determination of the ratemaking treatment to be applied by this Commission.

The argument that the recovery of fuel costs under the superseded fuel adjustment clause will be for a different thirty-six month period than the thirty-six months that the clause was in effect assumes that the old clause was a cost of service fuel clause. In making this argument on rehearing PSNH ignores the Commission's finding in Opinion No. 790 that the amount collected under PSNH's fuel adjustment clause was determined by the test period data gathered two months prior to the month of collection. The company's offer to reduce its surcharge by the amounts collected in November and December 1972 constitutes an after the fact attempt to establish a legal basis for the imposition of this surcharge. We cannot rely on PSNH's after the fact attempts to alter its fuel clause as a basis for approving the surcharge.

The rehearing petition fails to cite any legal grounds for an alteration of the Commission's prior opinion. The application for rehearing does not deal at all with the underlying basis of the Commission's decision that approval of the surcharge application would be a violation of the filed rate doctrine.[1] Additionally, PSNH fails to address the question of how the surcharge can be approved in light of the fact that the Federal Power Commission has no author-

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[1] ***Montana-Dakota Utilities Company*** **v.** ***Northwestern Public Service Company,*** **341, U.S. 246 (1951).**

ity to retroactively increase rates or to order reparations.[2] PSNH bases its application for rehearing on arguments of equity and policy. PSNH ignores the fact that Commission policy must always remain within the limits set out by statute. PSNH has failed to show how, while still conforming to the Federal Power Act, the Commission can modify its earlier opinion.

On April 8, 1977, Maine Public Service Company filed a petition to intervene and application for rehearing. Maine's application is based on our statement in Opinion No. 790 that in reaching that decision, the Commission had reviewed all briefs filed on the fuel adjustment clause surcharge issue in that proceeding and in others then pending before the Commission. Maine intervenes and asks for rehearing because it believes its case, Docket No. E-8264, will be affected by the outcome of this case because Opinion No. 790 may be construed as making findings of fact and conclusions of law which prejudice the outcome of the proceeding in which Maine is involved.

In Opinion No. 790 we stated that we had, "reviewed, where appropriate, the briefs filed on this issue in those proceedings and given consideration to the authority cited therein".[3] That statement was in no way meant to imply that a decision on the merits had been made in this docket which would be applied in those other proceedings without a careful review of the individual records. Our review of the briefs in those other proceedings was designed to more fully educate the Commission on the legal principles raised in this proceeding. While Opinion No. 790 may apply as precedent in those other proceedings, a determination of its applicability can only be made after a careful review of the facts of each individual case. Accordingly, it is not necessary for Maine to be granted intervention in this pro-

[2] *FPC* v. *Hope Natural Gas Company*, 320 U.S. 591, 618 (1944).

[3] Opinion No. 790, mimeo at 10.

ceeding to enable it to protect its interests. The total record in Docket No. E-8264 will be thoroughly reviewed before any Commission decision is rendered in that docket.

The Commission finds:

The application for rehearing of Opinion No. 790 has raised no new facts or legal principles that would require a modification of the original opinion and order.

The Commission orders:

(A) Maine Public Service Company's petition for intervention in this docket is hereby denied.

(B) The application for rehearing of Opinion No. 790 is hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [16 U.S.C. § 824(a)].

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. [16 U.S.C. § 824(b)].

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [16 U.S.C. § 824(c)].

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [16 U.S.C. § 824(d)].

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns

or operates facilities subject to the jurisdiction of the Commission under this Part. [16 U.S.C. § 824(e)].

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [16 U.S.C. § 824(f)].

SECTION 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [16 U.S.C. § 824d(a)].

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of [16 U.S.C. § 824d(b)].

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [16 U.S.C. § 824d(c)].

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [16 U.S.C. § 824d(d)].

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested

public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [16 U.S.C. § 824d(e)].

SECTION. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act. [16 U.S.C. § 825*l*(a)].

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such

proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were unreasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the

Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, Secs. 346 and 347). [16 U.S.C. § 825*l*(b)].

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [16 U.S.C. § 825*l*(c)].

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnent to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. [28 U.S.C. § 1254.]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

Public Service Company of New Hampshire,
Petitioner,

v.

Federal Energy Regulatory Commission,
Respondent,

New Hampshire Electric Cooperative, Inc.,
Towns of Ashland and
Wolfeboro, New Hampshire,
Village Precinct of
New Hampton, New Hampshire,
Intervenors.

CERTIFICATE OF SERVICE

I hereby certify that on this first day of August, 1979, three copies of this Petition for Certiorari were mailed, postage prepaid, to the following persons:

The Solicitor General
Department of Justice
Constitution Avenue between
9th & 10th Streets, N.W.
Washington, D.C. 20001

Howard E. Shapiro, Solicitor
Federal Energy Regulatory Commission
Room 8010
825 North Capitol Street, N.E.
Washington, D.C. 20426

Robert C. McDiarmid, Esquire
Spiegel & McDiarmid
312 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

I further certify that all parties required to be served have been served.

George F. Bruder
BRUDER & GENTILE
1201 Connecticut Avenue, N.W.
Suite 708
Washington, D.C. 20036
(202) 452-1985

Counsel for Petitioner

August 1, 1979